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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 575

COLORADO-WYOMING GAS COMPANY, a corporation,
PETITIONER,

vs.

FEDERAL POWER COMMISSION; COLORADO INTERSTATE GAS COMPANY, a corporation; CITY & COUNTY OF DENVER, COLORADO; PUBLIC SERVICE COMMISSION OF WYOMING; PUBLIC SERVICE COMPANY OF COLORADO; and CANADIAN RIVER GAS COMPANY, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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OCTOBER, 1944.

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INDEX.

	PAGES
PETITION FOR WRIT OF CERTIORARI	1-15
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	2-7
Summary and Short Statement	8-12
Special and Important Reasons for Granting the Writ	13-15
Conclusion	15
MEMORANDUM BRIEF IN SUPPORT OF PETITION	17-71
1. The Extent Geographically of the Rate-regulatory Jurisdiction of the Commission over this Petitioner in this Rate Case	18-24
2. The Authority, Duty and Scope of Judicial Review under the Natural Gas Act	24-37
3. The Character of the Legal Presumption on Review in Favor of the Commission Action	37-40
4. The Substantive Standards by Which the Propriety and Legality of the Commission Action is to be Measured by the Courts	40-44
5. The Commission Determination of "Original Cost" is Not the True and Entire Original Cost of Petitioner's Properties and Business	45-48
6. The Commission Fixation of "Service Life" is Not Supported by "Substantial Evidence"	48-50
7. The Rejection by the Commission of All "Going Concern Value" is Contrary to the Evidence and Erroneous in Law	50-53
8. The Commission so-called "Allocation of Cost of Service" is Without Support of "Substantial Evidence" and in Disregard of Law	54-64

PAGES

9. The Substance of "Due Process" under the Fifth Amendment to the Constitution Has Been Denied to This Petitioner by the Commission and the Court of Appeals 65-71

Conclusion 71

APPENDIX A. Pertinent Provisions of Natural Gas Act ..... 1-a - 4-a

APPENDIX B. Map of System of Colorado-Wyoming Gas Company 5-a

APPENDIX C. Excerpts from Hearings before the Committee on Interstate Commerce, House of Representatives (1st Sess., 74th Congress, 1935), re: Federal Power Act ..... 7-a - 19-a

APPENDIX D. Composite of Section 208 (originally numbered 211) of Federal Power Act as Proposed by Federal Power Commission, and as Enacted by the Congress 20-a

APPENDIX E. Comments and Analysis of Variant Contentions and Positions, Federal Power Commission, 1935-1943, re Principle of "Fair Value" and Congressional Action with respect thereto ..... 21-a - 28-a

PAGES

COURT AND COMMISSION DECISIONS.

Addison v. Holly Hill Fruit Products, Inc. (1944), ... U.S. ....., 64 Sup. Ct. 1215 ..... 18, 21, 32, 40

Alabama Power Co., Licensee, P.U.R. 1932D, 345 ..... 47, 55, 56, 62

American T. & T. Company v. United States, 299 U.S. 232, 57 Sup. Ct. 170 47

Bank of Columbus v. Okely (1819), 4 Wheat. 235 66

Baumgartner v. United States (1944), ... U.S. ....., 64 Sup. Ct. 1240 ..... 33, 39

Beaumont Sour Lake, etc. Co. v. United States, 282 U.S. 74, 51 Sup. Ct. 1 70

Board Pub. Ut. Comm'rs. v. N. Y. Tel Co., 271 U.S. 23, 46 Sup. Ct. 363 63

Chenery Corporation case (1943), 317 U.S. 80, 63 Sup. Ct. 454 ..... 32, 34, 35, 36, 38

Chicago District Electric Generating Corp., 39 P.U.R. (n.s.) 263 ..... 42, 46

Chicago Junction Case, 264 U.S. 258, 44 Sup. Ct. 317 25

Chicago M. & St. P. Ry. Co. v. Polt (1914), 232 U.S. 165, 34 Sup. Ct. 301 66

Cities Service Gas Co. (F.P.C. 1943), 50 P.U.R. (n.s.) 65 42

Colorado Interstate Gas Co. v. Fed. Power Comm., et al., 142 F. (2d) 943 ..... 10, 18, 31

Columbus Gas & Fuel Co. v. P.U.C., 292 U.S. 398, 54 Sup. Ct. 763 ..... 52, 54, 56, 57

Driscoll v. Edison Light & Power Co., 307 U.S. 104 41

East Ohio Gas Co., 1 F.P.C. 586 47

Eastern-Central M. C. Ass'n. v. U.S. (1944), 64 Sup. Ct. 499 ..... 34, 55, 67

Fairbanks v. United States (1901), 181 U.S. 283, 21 Sup. Ct. 651 23

PAGES

Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 575, 64 Sup. Ct. 281 ..... 18, 19, 20, 21, 23, 25, 29, 30, 31, 32, 34, 35, 36, 37, 38, 41, 43, 44, 46, 48, 69

Federal Power Comm. v. Natural Gas Pipeline Co., 315 U.S. 575, 62 Sup. Ct. 736 ..... 23, 28, 29, 32, 34, 35, 36, 41

Hope Natural Gas Co., 320 U.S. 575, 64 Sup. Ct. 281 ..... 18, 19, 20, 21, 23, 25, 29, 30, 31, 32, 34, 35, 36, 37, 38, 41, 43, 44, 46, 48, 69

Illinois Natural Gas Co. v. Central Illinois P. S. Co., et al., 314 U.S. 498, 62 Sup. Ct. 381 49

Interstate Commerce Commission v. Jersey City (1944) 64 Sup. Ct. 1129 ..... 34, 67

Interstate Commerce Commission v. Louisville & N. R. Co. (1912), 227 U.S. 88, 33 Sup. Ct. 185 39

Jersey Central Power & Light Co. v. Federal Power Commission, 319 U.S. 61, 63 Sup. Ct. 953 20

Kansas v. Colorado (1906), 206 U.S. 46, 27 Sup. Ct. 655 40

Kings County Co. v. Prendergast, 7 F. (2d) 192 47

Los Angeles Gas & Electric Corp. v. Railroad Commission, 289 U.S. 287, 53 Sup. Ct. 637 ..... 32, 38, 47, 52, 53

McCardle v. Indianapolis Water Co., 272 U.S. 400, 47 Sup. Ct. 144 53

Matter Portland General Electric Co., 1 F.P.C. 161 46

Milk Wagon Drivers' Union v. Lake Valley F. Products, 311 U.S. 91, 61 Sup. Ct. 122 40

PAGES

Missouri v. Kansas Gas Co. (1924), 265 U.S. 298 — 21

Missouri ex rel. S. W. Bell Telephone Co. v. Public Service Commision, 262 U.S. 276, 43 Sup. Ct. 544 — 46

Morgan v. United States, 298 U.S. 468, 56 Sup. Ct. 906 — 62

Natural Gas Pipeline Company case, 315 U.S. 575, 63 Sup. Ct. 736 — 23, 28, 29, 32, 34, 35, 36, 41

New York v. Richmond Gas Co. (N.Y.) 23 P.U.R. (n.s.) 463 — 46

North Dakota v. Minnesota, 263 U.S. 365, 44 Sup. Ct. 138 — 52

Northern Pacific Ry. Co. v. Dept. Public Works (1925), 268 U.S. 39, 45 Sup. Ct. 412 — 39

Panhandle Eastern Pipe Line Company v. Fed. Power Comm., 143 F. (2d) 388, 54 P.U.R. (n.s.) 26 — 30

Pennsylvania Power & Light Co. v. Federal Power Commission (C.C.A. 3), 139 F. (2d) 445 — 47

Portland General Electric Co., 1 F.P.C. Rep. 161 — 46

Public Service Comm. v. Attleboro Steam & Elec. Co. (1911), 273 U.S. 83 — 21

Queens Borough Gas & Electric Co. (N.Y.P.S. Comm.), 39 P.U.R. (n.s.) 65 — 63

Railroad Commission v. Pacific Gas & Elec. Co., 302 U.S. 388 — 41

St. Joseph Stocks Yards Co. v. United States (1936), 298 U.S. 38, 56 Sup. Ct. 720 — 26, 27, 28, 32, 37

PAGES

Saginaw Broadcasting Co. v. Federal Communications Comm., 96 F. (2d) 554 68

Securities & Exchange Commission v. Chenery Corp. (1943), 317 U.S. 80, 63 Sup. Ct. 454 ..... 32, 34, 35, 36, 38

Security Flour Mills Co. v. Commissioner Int. Revenue (1944), ... U.S. ....., 64 Sup. Ct. 596 39

Simpson v. Shepard, 230 U.S. 352, 33 Sup. Ct. 729 ..... 54, 55, 57, 58

Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 51 Sup. Ct. 65 ..... 46, 54, 56, 58

United Gas P. S. Co. v. Texas, 303 U.S. 123, 58 Sup. Ct. 483 ..... 52, 53

United States v. Carolina Freight Carriers Corp. (1942), 315 U.S. 475, 62 Sup. Ct. 722 ..... 32, 34, 62

United States v. American Trucking Ass'n., 310 U.S. 534, 60 Sup. Ct. 1059 62

Wabash Valley Electric Co. v. Young, 287 U.S. 488, 53 Sup. Ct. 234 54

Wichita R. & L. Co. v. Public Utility Comm. (1922), 260 U.S. 48, 43 Sup. Ct. 51 70

Wisconsin Tel. Co. v. Public Service Comm., 287 N.W. 122, 30 P.U.R. (n.s.) 65 47

OTHER CITATIONS.

Communications Act of 1934 68

Federal Power Act and Hearings Thereon 20, 37, 40, 41, 44, 61

Federal Power Commission Annual Reports 41

PAGES

Fifth Amendment to the Constitution 6, 7, 65-71

Joint Report, Senate and House Committees, Interstate Commerce, re Natural-Gas Act 20, 21, 26, 43

Judicial Code 3

Natural Gas Act 2, 3, 13, 14, 15, 18, 19-20, 21, 24, 25-26, 29, 33, 40, 42, 43, 44, 46, 50, 67, 68

Public Utility Act of 1935 37

Public Utility Holding Company Act of 1935 ..... 35, 37

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Colorado-Wyoming Gas Company, petitioner herein, (referred to as "Colorado-Wyoming Company" or "petitioner") prays that this Court issue its writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Tenth Circuit (referred to as "Court of Appeals") *(R. V. 2, p. 1120)*, affirming a final order of the Federal Power Commission (referred to as "Commission") under the "Natural Gas Act" of 1938, which order found that "the rates and charges made, demanded and received by Wyoming Company for and in connection with the transmission and sale of natural gas for re-

sale in interstate commerce * * are unjust, unreasonable and excessive to the extent of $119,000 per year," and directed reduction thereof accordingly *(R. V. 1, pp. 94-96)*.

OPINIONS BELOW.

The opinion of the Court of Appeals *(R. V. 2, pp. 1092-1120)*, in case entitled *Colorado-Wyoming Gas Co. v. Federal Power Commission, et al.*, is reported in 142 F. (2d) 943. The opinion and order of the Commission *(R. V. 1, pp. 45-85, 94-97)* is reported in 43 P.U.R. (n.s.) 205.

JURISDICTION.

The judgment of the Court of Appeals was entered July 8, 1944 *(R. V. 2, p. 1120)*; Petition for rehearing herein, filed on July 26, 1944 *(R. V. 2, p. 1123)*, was overruled August 9, 1944 *(R. V. 2, p. 1161)*. The jurisdiction of this Court is invoked under *Section 347(a) (Section 240, amended)* of the Judicial Code *(U.S.C.A., Title 28, Sec. 347(a))*, and *Section 19(b)* of the Natural Gas Act *(52 Stat. 821; 4 U.S.C.A., Title 15, Sec. 717r(b))*.

STATUTE INVOLVED.

The statute involved is the Natural Gas Act *(52 Stat. 821; U.S.C.A., Title 4, Sec. 717)*, the pertinent provisions of which are set forth in *Appendix A, this petition.*

QUESTIONS PRESENTED.

For clarity, each of the "Questions Presented" is preceded by a statement of the particular issue involved, based upon the record herein (with reference thereto) and the controlling law, as petitioner contends.

1. The Court of Appeals has ignored the statutory limitation upon the rate-regulatory jurisdiction of the Commission in that the jurisdiction of the Commission over this petitioner in this rate case under the Natural Gas Act is limited by law to rate-regulatory jurisdiction at the Cheyenne, Wyoming, "city gate" only *(R. V. 1, pp. 79, 120-126; R. V. 3, Ex. 10, pp. 2-4, Ex. 1, p. 7, Ex. 51, pp. 1-6)*.

The question presented then is: Whether the rate-regulatory jurisdiction assumed by the Commission over the intrastate operations of this petitioner in the State of Colo-

rado *(R. V. 1, p. 79)*, approved by the silence of the Court of Appeals, is without authority of and contrary to law and particularly *Section 1 (b)* of the Natural Gas Act.

2. The alleged "original cost" rate base, as determined by the Commission and approved by the Court of Appeals, is not the *entire* "original cost" in fact, in that it does not cover engineering design and construction costs in any amount or at all *(R. V. 1, pp. 244, 203)*.

The question presented then is: Whether the failure and refusal of the Commission and the Court of Appeals to include engineering design and construction in the rate base of this petitioner is contrary to law.

3. The Commission adopted a "prudent investment" rate base, so-called, predicated solely upon its alleged "original cost" as the exclusive measure of rate base *(R. V. 1, p. 69)*, and in so doing discarded in its entirety the principle of "fair value."

The question presented then is: Whether such action of the Commission and of the Court of Appeals was erroneous as a matter of law.

4. The Court of Appeals approved "the service life principle for determining annual and accrued depreciation" promulgated by the Commission *(R. V. 2, pp. 1114-1116)*. The Commission determination of "service life" disregarded the record in this case, wherein it affirmatively and specifically appears that there is no foundation of "substantial evidence" to support the speculative guesses and conclusions of service life adopted by the Commission *(R. V. 1, pp. 468-503, 65)*.

The question presented then is: Whether the determination of service life depends upon the existence of basic facts which must be disclosed in the record, and whether, in the absence of such basic facts in the record, the determination of the Commission is arbitrary and contrary to law.

5. The Commission determination of "depreciated original cost" adopted by the Court was arrived at from the assumed "service life" by simple arithmetical proration *(R. V. 1, pp. 556-562)*.

The question presented then is: Whether such determination of "depreciated original cost" is without support in the record and contrary to law.

6. The Commission, with the approval of the Court of Appeals, disallowed all "going concern value" on the authority of "This Commission and regulatory agencies in general" *(R. V. 1, p. 68)*, disregarding entirely the clear, specific and uncontroverted evidence in the record that the so-called "original cost," as found by the Commission, includes only "bare bone" cost of physical items of property, and does not reflect "a reasonable allowance" or any allowance whatever "in the other items and particularly in the appraisal of the physical assets as a part of the assembled whole" *(R. V. 1, pp. 203, 288, 297-298)*. The Commission did not offer any evidence in refutation of the affirmative evidence by petitioner *(R. V. 2, pp. 601-606)* of the fact of "going concern value" of its property and business.

The question presented then is: Whether such action of the Commission in denying as a matter of law any and all "going concern value" is contrary to law.

7. The opinion and order of the Commission approved by the Court of Appeals, under the subject title of "Allocation of Cost of Service," is predicated upon the following assumptions and conclusions, to-wit:

(1) It is assumed that the property of this petitioner and the properties of Colorado Interstate Gas Company and Canadian River Gas Company, admittedly separate and independent for all other purposes in all respects and for all other purposes, including rate making, nevertheless properly may be "integrated" as a single system for purposes of allocation required in this case *(R. V. 1, p. 79)*.

(2) The Commission "Allocation of Costs," approved by the Court of Appeals, is not based in whole or in part upon the peak-day deliveries or other operations of this petitioner, but is predicated upon the peak-day deliveries and operations of Colorado Interstate Gas Company *(R. V. 3, Ex. 226, Table 2, Line 28, Col. 7, 8, 9; R. V. 1, pp. 186, 358; R. V. 2, pp. 728-732, 561-562)*.

(3) The inaccuracy manifest in the record as to the

asserted factual basis adopted by the Commission for its conclusions of "allocation of cost of service" is ignored by both the Commission and the Court of Appeals. Such alleged basic facts are grossly inaccurate, and admittedly merely averages, estimates and guesses *(R. V. 2, pp. 728-732, 735-744, 746-748, 751-754, 756-758, 762, 764-765).*

(4) The Commission "Allocation of Cost of Service," approved by the Court of Appeals, *admittedly does not involve and is not predicated upon any allocation of property whatever* as between property and operations subject to the rate-regulatory authority of the Commission in this case and property and operations not subject to that authority in this case, nor does it give consideration to the *actual* operating conditions of petitioner's system including priority of domestic service over industrial service of gas *(R. V. 1, p. 80; R. V. 2, pp. 561-562, 730-731, 786-789).*

(5) It is assumed by the Commission "All that can be accomplished by an allocation of physical properties can be attained by allocating costs including the return" *(R. V. 1, p. 80)* and adopted by the Court of Appeals in the following language: "The Commission further stated that it did not follow from that obligation (i.e., "allocation of the property used in regulated business from that used in unregulated business") that an allocation of physical property or portions thereof must be made before any excessive returns were determined. • • • The separation or allocation may be effected by application of any formula which makes the principle a working one suitably adapted to the particular circumstances." *(R. V. 2, pp. 1112-1113).*

The question presented then is: Whether the allocation of cost of service, so-called, adopted in this case is without support in the record and contrary to law.

8. The opinion and order of the Commission with respect to material and fundamental issues do not disclose the foundation and basis in the record for the Commission action, nor are specific, essential and responsible findings of fact made and incorporated therein, with respect especially to jurisdiction, "original cost," "service life," allocation and

distribution of ordered review *(R. V. 2, pp. 52, 59, 65, 82-83, 85, 94-96)*.

The question presented then is: Whether thereby the statutory judicial review is thwarted, in that it cannot be determined by the reviewing court "other than by sheer acceptance of the Commission conclusion" what, if any, are the factual foundations therefor.

9. The Commission conclusion as to each of the material issues of jurisdiction, "original cost," depreciation, going concern value and allocation was not supported by "substantial evidence" and contrary to the law specifically controlling the determination of each of such material issues.

The question presented then is: Whether the order of the Commission is arbitrary, unreasonable, capricious, erroneous and unauthorized, and violates the Fifth Amendment to the Constitution of the United States.

10. The Court of Appeals in its opinion herein declared: "And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact • • •. We are content to say that a careful examination of the entire record convinces us that the finding is supported by substantial evidence • • •." *(R. V. 2, p. 1105)*. Under the law of the land the review provided, and to which this petitioner is entitled, is a review predicated upon the statutory standard that the "findings as to the facts" must be supported by "substantial evidence."

The question presented then is: Whether the asserted ultimate conclusion or finding of "unreasonableness" is without the support of substantial evidence as to each and every issue of material fact and erroneous as a matter of law.

11. The Court of Appeals relied upon *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 64 Sup. Ct. 281, and *Federal Power Commission v. Natural Gas Pipeline Company*, 315 U. S. 575, 62 Sup. Ct. 736, as requiring that court to decide the review herein against this petitioner *(R. V. 2, pp. 1106-7, 1114, 1119, 1120)*, thereby depriving this petitioner altogether of any real and effective court review of the Commission order.

The question presented then is: Whether the decisions of this Court in the *Hope Natural Gas Company* and *Natural Gas Pipeline Company* cases required the Court of Appeals so to decide, and if so, whether certain of the declarations and holdings of this Court in such decisions are contrary to the terms and provisions of the Natural Gas Act and in violation of the constitutional rights of this petitioner under the Fifth Amendment to the Constitution.

12. This Court, in the case of *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, declared: "And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

The question then presented is: Whether that position of this Court is contrary to the Natural Gas Act and other law of the land.

13. The Court of Appeals in this case in effect held the Commission determination of: (1) basic material facts; (2) ultimate conclusions; (3) issues of law; and (4) questions of jurisdiction, to be immune to the statutory judicial review accorded by the law of the land and particularly the Natural Gas Act.

The Court of Appeals also failed and refused to decide this case separate and apart from the issues in the cases of *Canadian River Gas Company* and *Colorado Interstate Gas Company, upon the independent issues herein presented.*

The question presented then is: Whether this petitioner has been denied "due process of law" by reason of erroneous and illegal assumptions and conclusions as to administrative finality and judicial impotency.

"SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED."

As disclosed by the "Questions Presented," *ante*, the Commission action, under examination in this review, involves fundamental errors, relating particularly: to the area of the rate-regulatory authority of the Commission over this petitioner in this case; to the character or the manner in which that rate-regulatory authority may be exer-

cised; to the probative substance of the evidence upon each of the issues of material fact; and to the propriety and legality of the ultimate findings and conclusions upon which its order is predicated. And finally, there is presented the important fact and issue: what is the character and extent of the statutory duty of review imposed by law upon the Court of Appeals and this Court.

Colorado-Wyoming Company is a small company. It presently owns and operates a natural gas transmission system from a point near Littleton, Colorado, to Cheyenne, Wyoming, with several branches. The main trunk line is approximately 114 miles long, *of which 10.5 miles are in Wyoming.* Branch lines are approximately 81 miles in length, *of which 2.3 miles serving the United States government at Fort Warren, Wyoming are in Wyoming.* (See *Map, R. V. 3, Ex. 50, Appendix B, this petition)* In 1939, the test year adopted by the Commission, the total gross sales of the Company were 3,332,446 M.c.f., producing $828,938 *(R. V. 3, Ex. 115, St. No. 1).* The total "sales for resale" of the Company were 1,706,000 M. c. f., producing a gross revenue of $579,000, of which "sales for resale" at the Cheyenne, Wyoming, "city gate" were 494,000 M. c. f., producing $182,000. Such Wyoming "sales for resale" were less than one-third of the total "sales for resale," both in quantities of gas sold and in gross revenue derived therefrom *(R. V. 1, pp. 126-128; R. V. 3, Ex. 245; St. No. 8).*

All cities, towns and communities supplied with natural gas by petitioner are served through contracts with sundry distribution companies "for resale for ultimate public consumption" for domestic and commercial use *(R. V. 1, pp. 190-193).* The only city or community served by petitioner outside the State of Colorado is the City of Cheyenne, Wyoming *(R. V. 1, p. 121).* Industrial users and public authorities are served directly by petitioner under contracts of "direct sale" to such customers as the ultimate consumers *(R. V. 1, pp. 193-200).* The only industrial user or public authority served outside of the State of Colorado is the United States government at Fort Warren, Wyoming *(R. V. 1, p. 121).*

Colorado "direct sales" aggregated 1,622,231 M. c. f., producing $241,948, and Wyoming "direct sales" aggregated 18,527 M. c. f. in 1939, producing $7,410 *(R. V. 1, p. 127. R. V. 3, Ex. 202, p. 32)*.

Petitioner company began operations in 1925. During the years 1925 to 1927 that part of the Company's system from and including Fort Collins, Colorado, north to and including Cheyenne, Wyoming, was constructed. At that time petitioner secured its entire gas supply from the Wellington Field of the Continental Oil Company, near Fort Collins, Colorado. That gas supply had been expected and was relied upon to meet all requirements of the Company with respect to its then completed system for a long term of years. However, it became apparent early in the year 1929 that the supply of gas from the Wellington Field, then rapidly diminishing, shortly thereafter would be entirely exhausted. As a consequence, it became essential at once for the Company to secure a new and independent source of supply to continue service to its then customers and to protect its own investment. The only supply available was Texas gas from the Texas Panhandle-Denver pipeline of Colorado Interstate Gas Company. Accordingly, a twenty-year contract for the purchase of such Texas gas from the company last named was entered into in October, 1929, such gas to be purchased from Colorado Interstate Gas Company and delivered to Colorado-Wyoming Company at the Arapahoe metering station of this petitioner near Littleton, Colorado.

In the years 1929 and 1930, petitioner constructed 73 miles of main 10-inch and 8-inch transmission line from the Arapahoe measuring station near Littleton, Colorado, to Fort Collins, Colorado, where connection was made with the then existing operating system of petitioner from Fort Collins, Colorado, to Cheyenne, Wyoming.

After construction of the Arapahoe-Fort Collins main line, and the commencement of purchase of gas at the "Arapahoe Station" near Littleton, Colorado, there was no enlargement or extension of facilities or service in or for Wyoming.

In the years 1929 to 1931, several branch transmission lines were constructed from the newly constructed Littleton-Fort

Collins line for the sale and delivery of gas for resale for ultimate public consumption in about a dozen different cities and towns, all in the State of Colorado. In the years from 1932 to 1939, lateral lines also were constructed to serve sundry industrial customers under direct sales, all in the State of Colorado.

(R. V. 1, pp. 121-126).

There were thus in fact two separate and independent stages in the development of the Colorado-Wyoming Company system: (1) 1925-1929, the construction, completion and utilization of the Fort Collins-Cheyenne system served exclusively by the Wellington, Colorado, gas field of the Continental Oil Company; and (2) 1929-1941, the construction, completion and utilization of the Littleton-Cheyenne system and branches, now served (except about 2%) from the Texas Panhandle field by the facilities of the Canadian River and Colorado Interstate companies. In this fundamental change in the company's operations, the original and complete Fort Collins-Cheyenne system has become a part only of the now operating Littleton-Cheyenne system. This historical development of the enterprise is significant and highly important in connection with certain phases of this case hereinafter considered.

Colorado-Wyoming Company presently purchases its gas supply in Colorado (near Littleton) from Colorado Interstate Gas Company. Such completed sale by the latter named company to petitioner is subject to the rate-regulatory authority of the Commission, and that authority was exercised by the Commission in the fixation of rates charged by Colorado Interstate Gas Company to Colorado-Wyoming Company at the Arapahoe metering station near Littleton, Colorado *(Colorado Interstate Gas Company v. Federal Power Commission, et al., 142 F. (2d) 943; R. V. 1, pp. 85, 90-94).*

The systems of the two companies are connected solely for the purposes of such sale, purchase and delivery. The two systems are entirely independent in management, control and operation. They are not "integrated," or in any sense a single system, or combined in any manner, or for any purpose. Upon this the record is clear *(R. V. 1, pp. 120-121.*

122-123; V. 3, Ex. 10, pp. 2-4). This fact is admitted by the Commission in its opinion *(R. V. 1, p. 79)* and by the impressive fact that throughout the proceedings before the Commission and the rate determinations made by it, Colorado-Wyoming Company was of necessity considered and dealt with as wholly separate from and independent of Colorado Interstate Gas Company (save only that the Commission, unsupported by fact, resorted to the fiction of "integration" for purposes of its "allocation of cost," so-called). Colorado-Wyoming Company, *then an operating company*, was no part of or in any manner considered in or a part of the agreed plan of development *(R. V. 3, Ex. I, p. 7)* of the Texas pipeline to Denver *(Op. of Ct. of App., 142 Fed. (2d) 943, 948-949)* but became merely a purchaser of such gas at a later date because of the unexpected exhaustion of its supply of gas from the Wellington Field in Colorado *(Op. of Ct. of App., 142 Fed. (2d) 943, 950) (Comm. Ex. 51, R. V. 3, pp. 1-6).*

It appears in the record, without dispute, that the system of Colorado-Wyoming Company, as originally built and as later enlarged, was conceived, constructed and at all times operated on the foundation of the priority of domestic and commercial customers served under "sales for resale" contracts over industrial customers served through contracts for "direct sales" *(R. V. 1, pp. 128, 150-152).*

Preference for domestic users and "cut off" or "shut off" of industrials if necessary to supply the demands of domestic users is a fundamental characteristic of the Colorado-Wyoming Gas Company system and of its operations. Such preference and "shut off" is provided and required in several ways; and as shown by evidence in this case:

By the contract between Colorado Interstate Gas Company and Colorado-Wyoming Gas Company *(R. V. 3, Ex. 101, pp. 4-5);* by contracts between Colorado-Wyoming Gas Company and Public Service Company of Colorado *(R. V. 1, p. 192);* by the respective contracts between Colorado Interstate Gas Company and Public Service Company of Colorado, Pueblo Gas and Fuel Company and Colorado-Wyoming Gas Company, in which the cities of Denver and Pueblo are given priority over Colorado-Wyoming Gas

Company *(R. V. 3, Ex. 101, p. 4)*; and by the various franchises to the distribution companies granted in Arvada, Berthoud, Boulder, Fort Collins, Golden, Greeley, Johnstown, Loveland, and Longmont, *Colorado*, to supply natural gas purchased from Colorado-Wyoming Gas Company in the cities and towns named, which provide for such preference "cut off" or "shut off" in substantially the same language as follows:

> The rates to be charged by the company for natural gas service to industrial users for heating, manufacturing, power and other purposes, may be lower and different from those charged for domestic purposes, and the company may contract with industrial users for the sale of such natural gas, provided that all such contracts contain a "cut off" clause which shall recognize the preferred rights of domestic users over industrial users, *(R. V. 1, pp. 150-152)*.

Deliveries under all industrial contracts are subject to curtailment or "shut off" to satisfy the demands of domestic consumers *(R. V. 1, p. 195)*.

"Shut off" or "curtailment" of consumers has occurred on numerous occasions in the operations of the Company *(R. V. 1, pp. 146-149, 152-157)*.

The Commission, with full knowledge thereof, gave no consideration and no effect to such facts and factors in its so-called "Allocation of Costs for Wyoming Company" *(R. V. 3, Comm. Ex. 227)*, adopted by the Commission in its order *(R. V. 1, pp. 59-60; R. V. 2, pp. 728-731, 786)* and approved by the Court of Appeals in its opinion herein *(R. V. 2, pp. 1112-1113)*.

(R. V. 1, pp. 183-186).

In the interest of brevity, such additional record facts relating to each of the several specific issues and questions presented herein, as appear to be necessary or desirable adequately to discuss such issues and questions, will be submitted in the attached brief argument, *post*.

"SPECIAL AND IMPORTANT REASONS" FOR GRANTING THE WRIT OF CERTIORARI HEREIN.

In conformity with the requirements of the applicable Rules of the Supreme Court, the substantial reasons (presented with greater particularity in the short brief of argument hereto attached), requiring this Court to issue the writ herein sought, as contended by petitioner, are summarized as follows:

I. The Federal Power Commission, in this case, has disregarded the law of the land, in that, among other things

(1) The Commission ignored the lawful ambit of its statutory authority over this petitioner in this rate case under the Natural Gas Act.

(2) The Commission in this case, as well as in other cases, has adopted as its sole guide and measure the so-called "prudent investment" rate base, contrary to law and the direct, specific and declared purpose, intent and enactment of the Congress, in the Natural Gas Act of 1938 and the Public Utility Act of 1935.

(3) The Commission in its opinion and order herein discarded relevant, uncontroverted and controlling evidence upon issues of material fact; indulged conjecture, guess and speculation in the absence of substantial or any evidence to permit the conclusions announced; and cast aside the great body of applicable judicial decision (much of which even *at this time*, has not been judicially condemned or overruled); and generally while adhering to the *forms* of "due process," erroneously has declared both the facts and the law to be in conformity with the non-existent statutory policies and objectives, which the Commission has undertaken to establish. As a result, the Commission action in this case was lawless, arbitrary and contrary to law.

II. The Circuit Court of Appeals for the Tenth Circuit, in this case, has disregarded the law of the land, in that, among other things:

(1) Said Court of Appeals "guided", so it is said, by the decisions of this Court in *Hope Natural Gas Company* and *Natural Gas Pipeline Company* cases, has held herein, despite errors of law and of fact disclosed in the record

and in some instances evident in opinion of the Court of Appeals, that under the alleged "statutory standard of 'just and reasonable'" and "the impact of the rate order," the Commission order is lawful and valid "in its entirety," contrary to law and the direct, specific and declared purpose, intent and enactment of the Congress, and particularly *Section 19 (b)* of the Natural Gas Act.

(2) Said Court of Appeals ignored the fundamental issue as to the extent of jurisdiction of the Commission over this petitioner in this rate case under the Natural Gas Act, which issue under law cannot be adjudicated by the Commission or disposed of by the rule of "total effect," "impact of the rate order" or "end product."

(3) Said Court of Appeals, as a court of review, did not predicate its opinion or render its decision by the determination of whether or not as to the several specific material issues of fact, "the findings of the facts" were "supported by substantial evidence," contrary to law and the direct, specific and declared purpose, intent and enactment of the Congress and particularly *Section 19 (b)* of the Natural Gas Act.

(4) Said Court of Appeals denied to this petitioner "due process of law," by reason of the matters and things aforesaid, and also by reason of the failure and refusal of that Court to decide this case separately from the *Canadian River Gas Company* and *Colorado Interstate Gas Company* cases, and specifically upon the issues herein presented, which independent issues were developed before the Commission and presented to said Court in separate hearings, upon a separate record and through separate briefs.

III. The Supreme Court of the United States, in the *Hope Natural Gas Company* and the *Natural Gas Pipeline Company* cases, *ante*, has disregarded the terms of the Natural Gas Act and other law of the land, and thereby has directly affected and substantially injured this petitioner in law and in fact, in that, to-wit:

(1) This Court has discarded and repudiated the principle of "fair value," contrary to law and the direct, specific and declared purpose, intent and enactment of the Congress,

in which body "all legislative power" of the federal government is "vested."

(2) This Court, by an attempted process of rationalization, has destroyed *Section 19(b)* of the Natural Gas Act, contrary to law and the direct, specific and declared purpose, intent and enactment of the Congress, whereby the right of appeal accorded by Congress has become virtually an empty right.

(3) This Court has declared and substituted, for the established presumption in favor of the administrative order on review, the requirement that "he who would upset the rate order carries the heavy burden of making a convincing showing that it is invalid *because it is unjust and unreasonable in its consequences*," contrary to law, and including particularly the Natural Gas Act.

(4) This Court, by its decisions aforesaid, in advance denies to this petitioner "due process of law," for as a result of said decisions the statutory review which Congress expressly gave amounts merely to a validation of the Commission theories, practices and orders, subject only to a vague and undefined right of protection against a newly devised and restricted concept of "confiscation," measured only by sounding phrases.

CONCLUSION.

For the foregoing reasons, more fully stated and considered in the brief and argument hereto attached, it is respectfully submitted that the petition for writ of certiorari should be granted.

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MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This petition for writ of certiorari is addressed to issues which are fundamental and vital to this petitioner, a small "natural gas company" under the Natural Gas Act.

This case, however, actually is much more than a "rate case." It reflects and involves the development and application of social, economic and governmental theories and practices, neither contemplated or approved by Congress nor permitted by the Constitution. They amount to drastic and revolutionary changes in our American constitutional system, of vital concern to all citizens.

Our discussion of the several "Questions Presented" and of the "Special and Important Reasons" for certiorari herein will be comprehended under the following subject headings:

1. The extent geographically of the rate-regulatory jurisdiction of the Commission *over this petitioner in this rate case.*

2. The authority, duty and scope of judicial review under the Natural Gas Act.

3. The character of the legal presumption on review in favor of the Commission action.

4. The substantive standards by which the propriety and legality of the Commission action is to be measured by the Courts.

5. The Commission determination of "original cost" is not the true and entire original cost of petitioner's properties and business.

6. The Commission fixation of "service life" is not supported by "substantial evidence."

7. The rejection by the Commission of all "going concern value" is contrary to the evidence and erroneous in law.

8. The Commission so-called "allocation of cost of service" is without support of "substantial evidence" and in disregard of law.

9. The substance of "due process" under the Fifth Amendment to the Constitution has been denied to this petitioner by the Commission and the Court of Appeals.

1. The Extent Geographically of the Rate-Regulatory Jurisdiction of the Commission over this Petitioner.

The position of this petitioner is that the one and *only* sale for resale by it in *interstate* commerce *(Sec. 1(b))* of the Act, *Appendix A, p. 1-a, post)* that is, "the sale of natural gas across state lines," *(Federal Power Comm. v. Hope Natural Gas Co.*, 320 U.S. 575, 64 Sup. Ct. 281, 292) is at the "city gate," Cheyenne, Wyoming; and that *all* "city-gate" sales for resale in Colorado are made in *intrastate* commerce. See, *Appendix B, p. 5-a, post.*

This issue is neither considered nor resolved by the Court of Appeals in its opinion. The action of the Commission in summarily disposing of this question by merely assuming rate-regulatory jurisdiction over *all* operations of Colorado-Wyoming Company, in Colorado as well as at the "city gate," Cheyenne, Wyoming, is adopted in silence by that Court. This petitioner is entitled upon this issue, as well as upon other issues in the case, to a separate, direct and specific judicial consideration and determination thereof, under the terms of the Natural Gas Act, the facts in this record and other controlling law.

The law is settled that "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested." *(Addison v. Holly Hill Fruit Products, Inc.* (1944), ... U.S. .....; 64 Sup. Ct. 1215-1220).

Colorado-Wyoming Company purchases its gas supply *in Colorado* (at Littleton) from Colorado-Interstate Gas Company. Such *completed* sale by the latter named company to petitioner is subject to the rate-regulatory authority of the Commission, and that authority has been exercised by the Commission *(Colorado Interstate Gas Co. v. Federal Power Commission, et al.*, 142 F. (2d) 943). The systems of the two companies are connected solely for the purposes of such sale, purchase and delivery. The two systems, however, are not "integrated," nor in any manner combined.

They are entirely independent in management, control and operation. Upon this, the record is clear. This is admitted by the Commission in its opinion *(Op. R. V. 1, p. 79)* and by the impressive fact that throughout the proceedings before the Commission and the rate determinations made by it, Colorado-Wyoming Company was of necessity considered and dealt with as wholly separate from and independent of Colorado Interstate Gas Company (save only that the Commission, unsupported by fact or law, resorted to the fiction of "integration" for purposes of its "allocation of cost," so-called). Colorado-Wyoming Company, then an operating company, was no part of nor in any manner considered in the agreed plan of development *(R. V. 3, Ex. I, p. 7)* of the Texas pipeline to Denver *(Op. of Ct., pp. 3-5)* but became merely a purchaser of such gas at a later date because of the unexpected exhaustion of the Wellington Colorado Field *(Op. of Ct., V. 2, p. 1096; Comm. Ex. 51, R. V. 3, pp. 1-6)*. These are the facts, uncontroverted in the record. See, Summary Statement, *ante*.

To buttress its assumption of enlarged geographic jurisdiction, the Commission relied upon *Illinois Natural Gas Company v. Central Illinois Public Service Co., et al.*, 314 U.S. 498, 62 Sup. Ct. 381. The contention of the Commission is not supported in the later opinion of this Court in *Federal Power Commission, et al. v. Hope Natural Gas Co.*, 320 U.S. 575, 64 Sup. Ct. 281.

Therein this Court differentiates and distinguishes the restricted ambit of rate-making authority under *Sections 4 and 5* of the Act, and the *unrestricted* authority of the Commission with respect to extension or abandonment of facilities and service and certificates of public convenience and necessity under *Section 7* of the Act. It is entirely clear that these two Commission authorities, independently delegated by Congress, stem from separate and different basic concepts as this Court points out with particularity in distinguishing *Illinois Natural Gas Company v. Public Service Co., supra.* *(Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 575; 64 Sup. Ct. 281, 291-292)*.

Under *Section 7* the general supervisory jurisdiction of the Commission reaches every "natural gas company" as defined by the Act. Colorado-Wyoming Company concededly

is a "natural gas company" under the Act, that is, "engaged in the transportation of natural gas interstate commerce, or the sale in interstate commerce of such gas for resale." But the rate-regulatory jurisdiction of the Commission under *Sections 4 and 5* is measured and limited by and to actual *interstate* sales for resale *(Sec. 1(b))*, or, as stated by this Court in the *Hope Natural Gas Co.* case, "sale of natural gas across state lines." See also, *Jersey Central Power & Light Co. v. Federal Power Commission*, 319 U.S. 61, 63 Sup. Ct. 953, 960.

The decision in the *Hope Natural Gas Co.* case obviously is no authority whatever for the conclusion of the Commission that because of the connection of the pipeline system of Colorado-Wyoming Company with that of Colorado Interstate Gas Company, the *intrastate* sales for resale of this petitioner in Colorado become sales in interstate commerce and, therefore, are "subject to the rate-making powers of the Commission." Both the Congressional Committee Report and this Court are in agreement as to the "basic purpose" of the Act, which was "to occupy" a limited field, particularly defined in the Committee Report upon which Congress relied and acted. To accomplish this the bill "was designed" and "so drawn" to take "no authority from State Commissions" and "in no manner usurp state regulatory authority." And, declare both Committee Report and this Court, there is "nothing novel in its provisions." To the States, says Congress, this Court concurring, actually were left all problems of local rate regulation.

The authorized representatives of the Commission who sponsored before Congress the Commission-drafted Federal Power Act, the companion act to the Natural Gas Act, time after time protested that "intrastate services and rates" were not to be subject to federal rate regulation; that "the bill only applies to interstate rates at wholesale in interstate commerce"; that, if part of the business was intrastate and part interstate, the Commission would have rate-regulatory jurisdiction over that part only which was "transmitted and sold in interstate commerce." Congress was told these things and also was given further specific assurance that no jokers of any kind were involved, either of language or of ulterior motives *(Appendix C, pp. 12-a, 14-a, 15-a, 17-a, 18-a, post)*.

We are told, both by Congress (H. Rep. No. 709, 75th Cong., 1st Sess., approved by Senate Rep. No. 1162, 75th Cong., 1st Sess., 1937) and this Court *(Federal Power Comm. v. Hope Natural Gas Co.*, 64 Sup. Ct. 281, 291), that the Natural Gas Act provides "for regulation along *recognized* and more or less *standardized* lines"; that there is "*nothing novel* in its provisions"; that "Sec. 4(a) and Sec. 5(a) (setting up the procedure for rate regulation) contain only the *conventional* standards of rate making for natural gas companies"; and that "the basic purpose" of the Act is "to occupy this field in which (Note: referring to *Missouri v. Kansas Gas Co.* (1924), 265 U.S. 298 and *Public Service Comm. v. Attleboro Steam and Electric Co.* (1927), 273 U.S. 83) the States may not act."

Despite the foregoing professions, the reports of the congressional committees *(Hope Natural Gas Company* case p. 291 of 64 Sup. Ct.), and the terms of *Section 1(b)* of the Act, which do not require or even permit an excursion into the field of construction to ascertain congressional intent or meaning *(Addison v. Holly Hill Fruit Products, Inc.*, ... U.S. ....., 64 Sup. Ct. 1215, 1220-1221), the Commission manages to find a way to enlarge its rate-regulatory authority over this petitioner. It simply assumes that *Colorado* "sales for resale" are in "*interstate* commerce" after having regulated the rates of the *completed* "sale for resale" by Colorado Interstate Gas Company to this petitioner at the Arapahoe Colorado measuring station. Additionally, by its order it regulates *separately* the rates and charges of this petitioner, as wholly independent of and unrelated to Colorado Interstate Company. But for purposes, first, of jurisdiction, and, second, of allocation, it treats petitioner as part and parcel of Colorado Interstate Company. Thus in this, as in numerous other respects, rationalization by the Commission becomes merely a device to an end—and that end is whatever the desired objective of the Commission may be.

It cannot be questioned but that the area of the rate making authority of the Commission is strictly limited and intended to be so. The restricted ambit of such power, declared in both affirmative and negative language *(Sec. 1 (b))* must control the Commission and must be enforced by the

courts if Congress is to continue to perform the legislative functions delegated to it. Whatever broad powers the Commission may have *within* the ambit of its statutory authority, they can afford neither justification nor excuse for the assertion by it of enlarged and forbidden boundaries and frontiers of power.

Yet the Commission, with the approval of the Court of Appeals, has asserted rate-regulatory jurisdiction over local Colorado sales for resale by petitioner, which buys all of its natural gas requirements *locally in Colorado.* This petitioner, moreover, is neither an "associate" of or "integrated" with Colorado Interstate Gas Company, in fact or in law, but merely one of its "customer companies" *(Op. Ct., R V. 2, p. 1096).* The judgment of every administrative agency or court should be so schooled that it is not fooled. As a simple and practical matter and one of easy and common understanding, the sale by this petitioner of natural gas for resale, at the "city gate" Greeley, Colorado, to the Greeley Gas and Fuel Co., for instance, is a purely local sale, clearly subject to the rate-regulatory jurisdiction of the State of Colorado, and obviously intended and declared by Congress to be withheld from the Commission. The Littleton "gate rate" *necessarily* evidenced *the consummation* of the sale, purchase and delivery of natural gas to petitioner *after completion* by Colorado Interstate Gas Company of its interstate transportation thereof. The Commission position is usurpation, and yet that Court by default has permitted that Commission position to prevail.

The Act expressly withholds *all* control over intrastate sales for resale, in addition to all "direct" sales. It is not to the point that Congress possibly might have conferred full power of rate control over the local Colorado sales for resale, as incidental to the major grant of authority—it did not do this. If the Colorado-Wyoming Company pipeline system did not cross the state line into Wyoming, the Colorado business would be beyond peradventure local. The Colorado business does not become national or interstate or constitute "the sale of natural gas across state lines," and subject to Commission rate-regulatory control, merely *because* the Cheyenne "city-gate" contract of "sale for resale"

made and consummated in *Wyoming* is subject to Commission rate-regulatory jurisdiction. *Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133, 51 Sup. Ct. 65, 70, *et seq.*

The substantial consequences of the error here involved are clearly shown by the record. In 1939, the test year adopted by the Commission, the total sales for resale were 1,706,000 M.c.f., producing $579,000, of which sales for resale at the Cheyenne, Wyoming, "city gate" were 494,000 M.c.f., producing $182,000. Such Wyoming sales for resale were less than one-third of the total sales for resale both in quantities of gas sold and revenue derived therefrom *(R. V. 3, Ex. 245, St. No. 4 and St. No. 8)*. By the Commision order of reduction in the rates of "sales for resale" (erroneous also in other respects), $58,000 was allocated to Wyoming "sales for resale" and $61,000 to Colorado "sales for resale". *(R. V. 4, p. 85)*.

Whatever may be the limits of the doctrine of "end result," "rate impact" and ultimate "consequences," announced by this Court in the *Natural Gas Pipeline Company* and *Hope Natural Gas Company* cases, hereinafter considered, that doctrine cannot by-pass or dispose of jurisdictional issues. Congress either undertook to give the Commission rate-regulatory jurisdiction over the *Colorado intrastate* "sales for resale" of this petitioner, or it did not.

That question can be decided in favor of the actual assumption of such jurisdiction by the Commission only by a determination that such "sales for resale" are "interstate" in fact and in law. It is not enough, *under the terms of the Natural Gas Act*, to assert that such sales may "affect" interstate commerce, they themselves must be interstate commerce which they are not.

If the Federal Power Commission follows any rule of statutory construction whatever as a guide to its action, it is "that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed." This, declared that great judge, *Mr. Justice Brewer*, "would be a strange rule of construction." *(Fairbanks v. United States* (1901), 181 U. S. 283, 21 Sup. Ct. 651).

The unequivocal language of the Act granting and withholding rate-regulatory authority is: "The provisions of this Act shall apply * * * to the sale in interstate commerce of natural gas for resale for *ultimate* public consumption * * * but shall not apply to any other * * * sale of natural gas * * *" *(Sec. 1(b)).*

2. The Authority, Duty and Scope of Judicial Review under the Natural Gas Act.

The scope of the authority and *duty* of judicial review under the Natural Gas Act is governed and controlled by the terms and provisions of that Act. The determination of that scope admittedly is a legislative function, and Congress, in which body "all legislative powers" of the federal government "are vested", *has acted.* Neither the Commission nor the Courts have any authority to question or overrule that legislative policy and action, nor are the Commission and the Courts concerned, within the authorized spheres of their respective powers, as to whether Congress was required to accord the right of review which it in fact granted. The only inquiry is: What was that Congressional action? What review did Congress provide?

1. The Act *(Appendix A, p. 2-a, post)* specifically requires "a hearing," as a condition precedent to action, which hearing under our system of government is a term of substance, and clearly imposes the burden of proof on the Commission itself *(Op. Comm. R. V. 1, p. 79).* This apparently is recognized by the Court of Appeals *(Op. Ct., R. V. 2, pp. 1104-5).*

Moreover, there never has been any doubt about the meaning of the statutory language "whenever the Commission after a hearing * * * shall find that any rate * * * is unjust, unreasonable * * * *(Sec. 5 (a)).* *Mr. Justice Brandeis* in a confiscation case, speaking for this Court, declared:

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing', prescribed quasi judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed

will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The Chicago Junction Case, 264 U. S. 258, 265; 44 Sup. Ct. 317, 319-20.

2. The foundation of the Commission "rate making function" is largely factual as pointed out by this Court in the *Hope Natural Gas Co.* case *supra (Secs. 6, 8, 9, 10 and 14)*.

3. Hearings, appropriate records thereof, and governing rules of procedure, contemplate a full and complete trial of all relevant issues of fact and law (*Secs. 15 and 16*).

4. The provision for rehearing before the Commission provides that such application "shall set forth *specifically* the ground or grounds upon which such application is based," not merely a general objection that the finding of "unreasonableness" is "arbitrary" (*Sec. 19 (a)*). Thus the Commission is given opportunity to correct its errors, on the assumed concept that "true wisdom always is discreet, and not ashamed of wise retreat."

5. The judicial review, predicated *solely* upon the "transcript of the record" before the Commission (*See Appendix A, pp. 3-a, 4-a, post*), provides: (1) "No objection to the order of the Commission shall be considered by the Court unless such objection shall have been urged before the Commission in the application for rehearing * * *," which means that all such objections so urged shall be considered by the reviewing Court; (2) "The finding of the Commission as to the *facts*, if supported by substantial evidence, shall be conclusive," or conversely, if not supported by "substantial evidence," cannot stand; (3) a party, on proper showing, may be permitted by Court order "to adduce additional evidence" before the Commission; (4) in such event, "The Commission may modify its *findings as to the facts* * * * and it shall file with the Court *such modified or new findings*, which if supported by substantial evidence shall be conclusive *and its recommendation*, if any, for the modification or setting aside

of the original order;" and (5) "The judgment and decree of the Court, affirming, modifying or setting aside, *in whole or in part*, any such order of the Commission, shall be final • • •" *(Sec. 19 (b))*. Herein *in plain language* the statute provides that usual and ample statutory review of rate making orders of administrative agencies, developed and established by long legislative and judicial practice and the undoubted applicable law of the land at the time of the passage of the Natural Gas Act.

6. The Congressional purpose and intent is made clear beyond any doubt. As declared by this Court in the *Hope Natural Gas Co.* decision, "The Committee Report stated that the *Act* provided 'for regulation along *recognized* and more or less standardized lines' and that there was '*nothing novel in its provisions*' H. Rep. No. 709, *supra*, p. 3. • • • Sec. 4 (a) and Sec. 5 (a) contain only the conventional standards of rate making for natural gas companies." (64 Sup. Ct. at page 294.) (Emphasis added.)

7. What then was the state of the law with respect to the scope of review of rate-regulatory orders of administrative agencies, *at the time* of the passage of the Federal Power Act (1935) and the Natural Gas Act (1938).

The case of *St. Joseph Stock Yards Co. v. United States* (1936), 298 U. S. 38, 56 Sup. Ct. 720, embodies a complete discussion of the law of the land, by *Mr. Chief Justice Hughes* (298 U. S. 51) and by *Mr. Justice Brandeis* (298 U. S., pp. 74-75). This Court in that case was reviewing an order of the Secretary of Agriculture fixing rates under authority of the Packers and Stockyards Act (1921), (42 Stat. 159 7 U. S. C., Secs. 181-229), on suits to restrain and annul such order in accordance with the provision which Congress had made for reviewing orders of the Interstate Commerce Commission.

Speaking for the Court the *Chief Justice* declared (pp. 725-726):

> "When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in

according a fair hearing and acting upon evidence and not arbitrarily. * * * In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."

* * * * *

"Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. * * * Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Mr. Justice Brandeis, who certainly cannot be charged with ever overstating or enlarging the *necessary and minimum* scope of review, even in a confiscation case, declared, in his concurring opinion (pp. 735-736):

"* * * Is there anything in the Constitution * * * that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?"

* * * * * *

"An order of the Secretary may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory; for the order of an administrative tribunal may be set aside for any error of law, substantive or procedural. * * * Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if neces-

sary, as it does in cases coming from the highest court of a state. * * * It may set aside an order for lack of findings necessary to support it, * * * or because findings were made without evidence to support them, * * * or because the evidence was such 'that it was impossible for a fair-minded board to come to the result which was reached.' * * * or because the order was based on evidence not legally cognizable, * * * or because facts and circumstances which ought to have been considered were excluded from consideration, * * * or because facts and circumstances were considered which could not legally influence the conclusion, * * * or because it applied a rule thought wrong for determining the value of the property. * * * These cases deal with errors of law or irregularities of procedure."

8. In view of all of the foregoing, it cannot be held, that the duty of a statutory review can be discharged in this case by a mere process of rationalization and a blanket finding that the *ultimate conclusion* of "unreasonableness" *(Comm. Order, R. V. 1, pp. 94-96)* is not arbitrary in its "total effect." It is to be observed that the Commission after making some eleven findings of assumed fact (there are no findings with respect to several material issues) declares: "*Therefore* the rates * * * received by Wyoming Company * * * are unjust, unreasonable and excessive." This conclusion ostensibly is *predicated* upon the opinion generally and the so-called Findings and Conclusions Nos. 1 to 11, inclusive, whether or not supported by the record, and *excludes* issues of material fact with respect to which there are no findings either in the order or the opinion of the Commission.

9. Yet this Court in the *Natural Gas Pipeline Company* case (315 U.S. 575, 586; 62 Sup. Ct. 736, 743) declared:

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of

due process have been over-stepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

And, in the *Hope Natural Gas Company* case, at pages 287 and 288 of 64 Sup. Ct., we find the following:

"And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. * * * Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. * * * It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable judicial inquiry under the Act is at an end."

What then do these quoted declarations of this Court mean? The answer is immediately evident from the two opinions in question.

The appraisal of "total effect" or "end result" is not based on the record and the facts and issues therein contained, *but whether, in the opinion of the Court*, the utility, as a result of the order, can thereafter survive and continue to do business. This is not even the usual and established test of confiscation, as we have seen.

Neither the Natural Gas Act nor the earlier decisions of this Court afford the slightest justification for or give any intimation whatever that the statutory *judicial* review, upon the record developed under the requirements of *Section 19*, and *measured by the statutory direction to the courts*, that "the finding of the Commission as to the facts" must be "*supported by substantial evidence*" is a barren right. Let there be no misunderstanding, the issues herein presented do not reflect mere "theory", "infirmities", "method" or "errors of reasoning"; they involve those fundamental matters and that very course of procedure detailed by *Mr. Justice Brandeis, supra*, as rendering an administrative order *totally invalid*, even in a confiscation case.

The revolutionary character and scope of the position of this Court, reflected in its opinion in the *Hope Natural Gas Company* case, *supra*, is made manifest by reference to the

recent opinion of the Circuit Court of Appeals for the Eighth Circuit in the *Panhandle Eastern Pipe Line Company* case, wherein is found the following:

"The opinion of the Supreme Court in the *Hope Natural Gas Company* cases (1944), 320 U.S. 591, 88 L. Ed. 276, 51 P.U.R. (n,s.) 193, 64 S. Ct. 281, indicates to us that, aside from questions relating to procedural due process and to jurisdiction, a reviewing court may interest itself only in the effect of the Commission's order. *The court cannot concern itself with the Commission's choice of formulae or the propriety of the methods employed by it in reaching its conclusion, but only with the consequences of the order made.* If the effect of the order is to deny to the utility a return sufficient reasonably to meet its necessities and to enable it to continue to render adequate public service, the order is arbitrary and confiscatory and may be set aside. *It seems apparent that the Supreme Court is presently of the opinion that, within broad limits, the Federal Power Commission should be freed from judicial interference in regulating rates of natural gas companies. It is evidently no longer necessary for a reviewing court to consider many of the doubtful and debatable questions which ordinarily arise in every rate case, such as:* whether replacement or reproduction cost less observed depreciation, or prudent investment, or historical cost, shall be used as a rate base; whether proper allocation of revenues which are subject to regulation and revenues which are not subject to regulation has been made by the Commission; *whether the cost or value of items of property which, for reasons deemed sufficient by the Commission, have been excluded by it from the rate base should have been included; whether the Commission has given due consideration to every pertinent fact; and whether the reasoning of the Commission which underlies its final determination is sound or unsound.*" (Emphasis added).

Panhandle Eastern Pipe Line Co. v. Federal Power Comm., 143 F. (2d) 488, 54 P.U.R. (n.s.) 26, 36-37.

In the instant case, the Court of Appeals in considering the issue of allocation, after ignoring the legal requirement that there be an allocation of *property*, details other objec-

tions to the Commission "Allocation of Cost of Service", so-called, and assuming the validity of such objections, declared:

"But, assuming that the requisite separation may be accomplished by an allocation of cost of service, the method used by the Commission is said to be erroneous. It is *argued* among other things that it *assumes* that all of the property is used in common in the conduct of all business *whereas a large portion is used exclusively in the regulated portion, another part is used exclusively in the unregulated portion, and only a part is used in common in both businesses;* that in respect to the property which is used in common for both businesses, it fails to give consideration to the priority or preferential use of such property in supplying gas for domestic consumption as against unregulated business, and ignores actual peak demands and load factors; *that it operates to minimize all costs, produces apparent cost much less than actual cost, and shifts cost from regulated to unregulated business; and that it is unsound in fact and law.* It may be conceded, without deciding, that the *method* is not *free from defects* or imperfections in *all* its aspects. But even so it cannot be said that as a consequence, the impact of the orders of reduction, each in its totality, produces arbitrary results or oversteps the bounds of due process. Therefore the orders are not open to further judicial inquiry on these grounds. *Federal Power Commission v. Natural Gas Pipeline Co., supra; Federal Power Commission v. Hope Natural Gas Co., supra.*" (Emphasis added.)

(R. V. 2, p. 1114)

Colorado Interstate Gas Co., et al. v. Federal Power Commission, 142 F. (2d) 943, 959.

If, as these Courts declare on the authority of this Court's opinion in the *Hope Natural Gas Company* case, "items of property" may be excluded from the rate base "*for reasons deemed sufficient by the Commission,*" or if applicable and controlling principles of law may be disregarded *as a matter of uncontrolled and uncontrollable discretion on the part of the Commission*, then it is obviously and utterly impossible for any litigant to make a "convincing showing" or any showing that the order is invalid under any standard or test.

be that test confiscation, lawlessness or unreasonableness in its "consequences."

Argument is not required to show the direct conflict between the "new order of things" disclosed in the *Hope Natural Gas Company* case and "the law of the land" expounded by *Mr. Chief Justice Hughes* and *Mr. Justice Brandeis* in the *St. Joseph Stock Yards Company* case, *supra*. Under the "total effect," "end result" theory, courts of review are cast adrift upon an uncharted sea and directed to guess whether an undefined and unmeasured "impact" produces unjust and unreasonable "consequences," which also are undefined and unmeasured. Such judicial doctrine undermines the very foundations of the Constitution itself.

The established and accepted scope of review (aside from the *Hope Natural Gas Company* case) comprehends compliance with the following: (1) "He who decides must hear," that is, must have an open mind to the issues in the particular case, unhampered by any predetermination or by nonexistent statutory theories, policies and objectives; (2) Constitutional rights must be regarded, not explained away; (3) Statutory powers, duties and limitations must be observed; and (4) the specific evidentiary foundations for the findings, conclusions and order must be supported in the record. (See *Securities and Exchange Comm. v. Chenery* (1943), 317 U.S. 80, 63 Sup. Ct. 454, 459, 462; *United States v. Carolina Freight Carriers Corp.* (1942), 315 U.S. 475, 489, 62 Sup. Ct. 722, 730; *Federal Power Comm. v. Natural Gas Pipeline Co.* (1942), 315 U.S. 575, 586, 62 Sup. Ct. 736, 743; *Addison v. Holly Hill Fruit Products, Inc.* (1944), ... U.S. ....., 64 Sup. Ct. 1215, 1220).

The decisions quoted and cited *supra*, hold that if the record discloses that the Commission has proceeded without supporting evidence or without warrant of law, no conclusion which the Commission reaches upon such improper basis can convert that wrong into right. It is only after the several specific determinations of material issues of fact have been found to be supported by "substantial evidence" and in conformity with controlling law that the court reaches the realm of "total effect" or "entirety." (*Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U.S. 287, 53 Sup. Ct. 637).

"Total effect," "end result," "rate impact," and "consequences," unmeasured by material facts or controlling law, are not "due process," even in a "confiscation" case. Furthermore, if courts of review are not concerned with particular issues as such, there is no occasion at all for the statutory review for relief from "confiscation" is still available through courts of equity. The salutary principle, that it is an error of law to render a decision predicated upon findings not supported by "substantial evidence," is the law declared in the Natural Gas Act, in conformity with the established and heretofore settled law of the land.

The terms "total effect," "end result," and "rate impact" are used to describe the method of thus reducing the *statutory* review to an idle gesture. Several of the justices protested without avail against this method of determining the validity of the Commission order on review, as being without control, measure, guide or standard of any kind. But strangely enough, none of the justices examined the Congressional action which established a clear and specific standard and requirement, to-wit: that "the findings as to the facts" must be supported by "substantial evidence." (Natural Gas Act, *Sec. 19(b)*)

"Findings as to the facts" and ultimate conclusions such as the conclusion of "unreasonableness" are quite different and always heretofore have been clearly differentiated by this Court and all other courts, federal and state. (See, *Baumgartner v. United States* (1944), 64 Sup. Ct. 1240.) Conclusions are of value when they are proven, and only then. As a matter of fact, that wide difference between facts and conclusions currently is expressly acted upon in the cases cited and in other circumstances under similar or identical statutory reviews.

The doctrine now advanced by this Court, despite the Act and such controlling law, would limit judicial review to the question of whether or not the Commission acted arbitrarily, in the broad and unrestricted opinion of the courts, losing sight of the record and the rules that the courts may always decide whether the Commission has acted within its prescribed legal limitations, and has observed the rules of law governing its action. It has never been the law that a rate-making authority may, by making a finding that certain

rates are "unreasonable," preclude judicial review of the foundations for and legality of such a finding, which is a conclusion merely.

Apparently to buttress the idea of "total effect" and "in its entirety," this Court, referring back to the *Natural Gas Pipeline Company* case, declares in the *Hope Natural Gas Co.* case: "Its (the Commission's) rate-making function, moreover, involves the making of 'pragmatic adjustments.'" "Pragmatic" is defined as "dealing with practical values or consequences." Presumably, as applied to the determination of a rate base, it would mean adjustment of or departure from the rigid Commission "original cost" formula. However, there is no way of knowing, for the Commission has not to date made any such adjustment or departure, in the interests of common fairness or otherwise. So too, we do not have any knowledge of the character, function, purpose or effect of the "pragmatic adjustments" referred to by this Court, or of the guides, standards or measures requiring them or by which they are to be ascertained. It appears, however, from the opinions of this Court in question that the entire matter of "pragmatic adjustments" is to be left to the unrestrained and unreviewable "discretion" of the Commission, and, thus, for all practical purposes, the "inquiry is at an end" before the case ever reaches the appellate court.

10. The evidence is accumulating that this Court, *not Congress*, is developing special rules and exemptions applicable to the review of orders of the Federal Power Commission. Such special treatment in support of the orders of that Commission is a clear departure from the long established rule currently applied with respect to other administrative orders, under identical statutory reviews (*Securities & Exchg. Comm. v. Chenery Corp.* (1943) 317 U. S. 80, 63 Sup. Ct. 454, 462; *United States v. Carolina Freight Carriers Corp.* (1942) 315 U. S. 475, 488-489; 62 Sup. Ct. 722, 729-730; *Eastern-Central M. C. Ass'n v. United States* (1944), 64 Sup. Ct. 499, 507-508; *Interstate Commerce Comm. v. Jersey City* (1944), 64 Sup. Ct. 1129).

As pointed out, the Congress evinced no intention whatever to delegate a freedom and immunity from review to the

Federal Power Commission not possessed by other administrative bodies, such as the Securities and Exchange Commission, the Interstate Commerce Commission, and the Secretary of Agriculture under the Packers and Stockyards Act. In fact, as we have seen, the Congress clearly and expressly declared it intended not to depart from the then "recognized," "standardized" and "conventional" law on the subject. Congress provided the same judicial review accorded with respect to the action of other federal administrative agencies, and neither the Commission nor the courts are warranted in departing therefrom because of doubts respecting, or disagreement with, the legislative course Congress has chosen.

The "Court Review of Orders" of the Securities and Exchange Commission is authorized by *Section 24 (a)* of the "Public Utility Holding Company Act of 1935" (U. S. C. A., Title 15, Sec. 79x; C. 687; 49 Stat. 834). *Section 24 (a)* of that Act is *identical* in language and in punctuation with *Section 19 (b)* of the Natural Gas Act. They are the same, word for word. Yet this Court has construed and applied these two *identical* review sections as totally different to produce entirely contrary results. As to the scope of review, the *Natural Gas Pipeline Company (1942)* and *Hope Natural Gas Company (1944)* cases are directly contrary to *Securities and Exchange Comm. v. Chenery Corporation (1943)*, 317 U. S. 80, 63 Sup. Ct. 454. In the *Chenery* case nothing is said about "total effect," "end result" or "unjust or unreasonable in its consequences." That opinion was not molded by the doctrine of administrative finality and judicial impotency, nor saturated with social, economic or governmental objectives and policies not authorized by Congress.

In the *Chenery* case (317 U. S. 80, 94-95, 63 Sup. Ct. 454, 462) this Court, *speaking through Mr. Justice Frankfurter*, says:

> "Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is *narrowly circumscribed* is beside the point. For the courts cannot exercise their *duty of review unles they are advised* of the

considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds *upon which the administrative agency acted be clearly disclosed and adequately sustained.* 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 197, 61 S. Ct. 845, 853, 85 L. Ed. 1271, 133 A. L. R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.' Ibid. Compare United States v. Carolina Carriers Corp., 315 U. S. 475, 488, 490, 62 S. Ct. 722, 729, 730, 86 L. Ed. 971. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." (Emphasis added.)

This language is molded by the principle of the supremacy of the enacted law of the land and its application to both Commission and Court. The recognition of judicial duty here apparent is not to be found in the *Natural Gas Pipeline Company* and *Hope Natural Gas Company* opinions. It is not conceivable that the Congress intended these two *identical* review sections to have different meanings and

variant effects. This is buttressed by the additional fact that the "Federal Power Act" (1935) was enacted at the same time as and in conjunction with the "Public Utility Holding Company Act of 1935," under the common title of "Public Utility Act of 1935." *Section 313 (a)*, entitled "Court Review of Orders" in the Federal Power Act (U. S. C. A. Title 16, Sec. 825-l C. 687, Title II, Sec. 213, 49 Stat. 860) also is *identical*, word for word, with the two review sections under consideration.

Yet, under the Holding Company Act, there is a review, while under the Natural Gas Act there is no review. Such appears to be the kind of "day in court" on review which has emerged from a statute that Congress and this Court solemnly declare contains "nothing novel in its provisions." Inexplicable!

If this be true, from what reservoir of constitutional power does this Court clothe itself with authority thus to deny that measure of review granted by the Congress?

3. The Character of the Legal Presumption on Review in Favor of the Commission Action.

This Court declared in its *Hope Natural Gas Company* opinion (64 Sup. Ct. 281, 288):

> "And he who would upset the rate order under the Act carries the *heavy* burden of making a *convincing showing* that it is invalid, *because it is unjust and unreasonable in its consequences.*" (Emphasis added.)

Apparently this is an adaptation and radical change and enlargement of the statement of *Mr. Chief Justice Hughes*, speaking for this Court, in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 53, 56 Sup. Ct. 720, 726:

> "We have said that 'in a question of rate making there is a strong presumption *in favor of the conclusions reached* by an experienced administrative body after a full hearing.' * * * The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing * * *" (Emphasis added.)

The last quoted declaration of this Court is understandable. On a review, "on the record" made before the Com-

mission, this Court repeatedly has held that the determinations to be made are whether the "conclusions reached" can be supported by the record and are in conformity with controlling law, even in a confiscation case. It is "beside the point," as stated in the *Chenery* case, *supra*, "that the scope of such review is circumscribed."

"Conclusions reached" and "consequences" are fundamentally different ideas. Then what about the "convincing showing" or proof, that the order is invalid "because it is unjust and unreasonable *in its consequences*"? What is the procedure by which such showing or proof is to be made? "If a thing can be done, an ingenious man can tell how to do it." Certainly no proof outside the record can be adduced before the Court of Appeals or this Court. Such being the fact, the ultimate "consequences" of the Commission action must appear from the record before the Commission. How is the "convincing showing" or proof to be incorporated into that record? This can be done, if possible at all, only if the utility, *before* that record is complete and closed and, of course, *before* the order is made, be required to anticipate an adverse order and additionally to know precisely the substance of that adverse order. For example, being in a state of such anticipation, if the utility offers proof of prior losses to offset the prior earnings theory featured by this Court in its opinion in the *Hope Natural Gas Company* case, such evidence would not be admissible (*Los Angeles Gas and Elec. Corp.*, 289 U.S. 287, 313, 53 Sup. Ct. 637).

Moreover, the overall appraisal on review of the "total effect," "end result" and "consequences" is the function of the Court, according to the opinion in the *Hope Natural Gas Company* opinion. How then is the utility to proceed *to make the record* in order to carry that "heavy burden" of making "a convincing showing" that the order is "unjust and unreasonable in its consequences" and, therefore, invalid?

Presumably such appraisal by the Court is made on the basis of the *previous* operations of the utility, and the assumed future effect of the order under the changed conditions produced by it. The future effect, of course, is highly speculative. The past can be a guide for the future only

when conditions in the two periods are conceived to be analogous and comparable, a premise that cannot be indulged, particularly since it cannot be known *in advance* that the order is to be adverse or what are to be its terms.

The result then is that the "heavy burden" of making a "convincing showing" as to "consequences" is in fact a totally impossible burden. Under the doctrine of "consequences," the *statutory* review becomes merely a ceremonial validation of the Commission action. The "end result" is that the right of review effectively is destroyed. The "impact" is destructive of the law of the land as defined in the Constitution.

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by *administrative fiat*. Such authority, however, beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." (Emphasis added.)

Interstate Com. Comm. v. Louisville & N. R. Co. (1912), 227 U. S. 88, 33 Sup. Ct. 185, 186.

See as also in conflict with the doctrine of "consequences" announced in the *Hope Natural Gas Company* opinion:

Northern Pacific Ry Co. v. Dept. Public Works, (1925) 268 U. S. 39, 44-45, 45 Sup. Ct. 412. (Opinion by Mr. Justice Brandeis);

Baumgartner v. United States (1944) ..... U.S. ....., 64 Sup. Ct. 1240, 1243-1244;

Security Flour Mills Co. v. Comm'r. Int. Rev. (1944) ..... U.S. ....., 64 Sup. Ct. 596, 598;

Addison v. Holly Hill Fruit Products, Inc. (1944) ..... U.S. ....., 64 Sup. Ct. 1215, 1223.

4. The Substantive Standards by which the Propriety and Legality of the Commission Action is to be Measured by the Courts.

The questions here presented are: What standards has Congress declared shall govern the Commission and the courts in the administration of the Natural Gas Act? Have the Commission and the courts discarded the standards thus prescribed by the Congress? If either the Commission or the courts, or both, have done so, is such action unlawful and invalid?

It requires no citation of authority to sustain the principle that the powers of the Commission "are limited not only by the constitutional standards but also by the standards of the delegation." It is immaterial in this connection whether the power of rate-regulatory control be described or declared to be "legislative" or "administrative" in character. "The creature cannot rule the creator," declared *Mr. Justice Brewer (Kansas v. Colorado* (1906), 206 U.S. 46, 27 Sup. Ct. 655, 661).

It is equally well settled and fundamental under our constitutional system that if Congress, in which body "all legislative powers" of the federal government are "vested," has declared its legislative policy, either by enactment or considered refusal to enact, the courts are without authority to override that legislative policy. *(Milk Wagon Drivers' Union v. Lake Valley F. Products,* 311 U.S. 91, 103, 61 Sup. Ct. 122, 128).

It will be helpful briefly to consider what Congress did and what Congress refused to do in connection with the enactment of the Federal Power Act (1935), and particularly *Section 208* thereof and the Natural Gas Act (1938) and particularly *Section 6* thereof.

In 1935, when the Federal Power Act was enacted, the Federal Power Commission, which drafted the Act as introduced in the 74th Congress, embodied in its draft (Section 208, originally numbered 211) the prudent investment theory of rate base as follows:

"In determining just and reasonable rates, the Commission shall fix such rates as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question."

This paragraph, after extensive hearings, was stricken in its entirety by Congress before enactment of the Act. Thereafter, in 1938, upon passage of the Natural Gas Act, the *identical* language of *Section 208* of the Federal Power Act was incorporated into and became *Section 6* of the Natural Gas Act.

For a comparison of the section as proposed by the Power Commission and as enacted by the Congress, see *Appendix D, p. 20-a, post.*

Thus, in enacting both Acts, Congress *expressly* refused to change the then existing law and accept the theory of rate base then proposed by the Commission.

In fact, as we have seen, *supra,* the Congress clearly and expressly declared it intended not to depart from the then "recognized," "standardized" and "conventional" law on the subject. This Court, *supra,* has stated that it so understands the Congressional action, and that "the basic purpose" of the Act is "to occupy the field in which the States may not act."

In the annual reports of the Commission for the years 1935 to 1940, both inclusive, there is no slightest intimation that Congress, either in 1935 or in 1938, had discarded the principle of "fair value" or had accepted the "prudent investment" rate base, so-called. (See *Appendix E,* pp. 21a-27a, *post),* upon which the spokesmen for the Commission insisted in 1935.

In *1938 (Railroad Comm. v. Pacific Gas & Electric Co.,* 302 U.S. 388); in *1939 (Driscoll v. Edison Light and Power Co.,* 307 U.S. 104); in *1942 (Natural Gas Pipeline Co. v. Federal Power Comm.,* 315 U.S. 575) and in *1943 (Federal Power Comm. v. Hope Natural Gas Co.,* 64 Sup. Ct. 281) the Federal Power Commission formally and extensively urged the Supreme Court to discard "fair value." Yet no part of its argument was addressed to the claim that Congress in either of the Acts had discarded "fair value," or

is reference made to the fact that Congress, in enacting both of the statutes in question, specifically refused to enact the "prudent investment" rate base proposed by the Commission.

Under all decisions of this Court, and other federal courts, "fair value" was the controlling principle at the time of the passage of both Acts in question.

Yet, in the face of this legislative history, the Commission in *1941* made the amazing claim *disclosed for the first time* in the *Chicago District Electric Generating Corporation* case (39 P.U.R. (n.s.) 263), that Congress, years before in 1935 and 1938, had given it *by deliberate indirection* the authority to adopt the very rate base which that body *specifically* had refused to embody in the regulatory acts, by which and only by which the Commission is authorized to act as a rate-regulatory body at all. The Commission, nevertheless, in its determinations of rate base, has adopted expressly, and now applies uniformly and exclusively in all rate cases, the formula known as "actual legitimate prudent cost." (See, *Re Cities Service Gas Co.* (F.P.C. 1943), 50 P.U.R. (n.s.) 65, 71) We are not here discussing whether that measure, or the principle of "fair value," or some other standard, should control, as a matter of theory and sound principle. Our present inquiry is: What authority in law and in public morals is there for this brazen appropriation of power by the Commission?

The very assumption of the power asserted by the Commission is a reflection on the Congress. Either that body was deliberately misled or it deliberately sought to accomplish by indirection that which it refused to do directly. As a matter of fact, the history of the legislation shows that neither of these things occurred in 1935 or in 1938. But, belatedly in 1941, the idea of distorting the Congressional intent and straining the language of *Section 6* was developed. The labored Commission opinion in the *Chicago District Electric Generating Corporation* case, *supra*, is based on the assumption of a non-existent fact, which does not find support in the legislative record, to-wit: that "Congress evinced a definite departure from the fair value doc-

trine * * *." The balance of the opinion repeated in other cases is an argumentative discussion in favor of the "prudent investment" theory. Had Congress intended to repudiate "fair value" and substitute for it the "prudent investment" theory, it would have been both easy and simple to have manifested such purpose. The obvious procedure would have been to enact the language proposed and strongly urged by the Commission. Instead that language was stricken in its entirety. Such refusal itself was a declaration and determination of legislative policy. The contention of the Commission that *Section 6(a)* only "contemplates the ascertainment of facts other than the actual legitimate cost which bear upon the fair value of the Company's property in rate making procedures *when the exigencies of the particular situation require such a determination*" is not supported by the Joint Committee Report. That Report states: "Subsection (a) authorizes the Commission to investigate and ascertain the actual legitimate cost of property, depreciation and other necessary facts for rate-making purposes" (Senate Rep. No. 1162, 75th Cong. 1st Sess.). This is not the language establishing a new doctrine of rate base. This statement does not suggest anything "novel". In fact the Committee declared, "There is nothing novel" in the Act as reported and as enacted.

Such then is the Commission technique. What have the courts, and particularly this Court, done to control, direct and restrain it within the statutory and other basic limitations and requirements of our governmental system? Precisely nothing up to this time.

It is the uniform view of legal writers who currently are giving consideration to the course of judicial decision that the delphic language on that subject in the opinion of *Mr. Justice Douglas* in the *Hope Natural Gas Co.* case now seeks to plant the kiss of death upon "fair value." The language to which we refer is:

> "It does, however, indicate that 'fair value' is the end product of the process of rate-making, not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon

'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated."

(64 *Sup. Ct.* 281, 287).

If that be the true view, from what reservoir of constitutional power does this Court draw to itself legislative power thus to discard and outlaw that standard which Congress expressly and pointedly declared should not be discarded or outlawed?

The reference in the *Hope Natural Gas Company* opinion to "the statutory standard of 'just and reasonable'" avails nothing, for the common law requirement *(Appendix C, p. 19-a, post)* that rates be "just and reasonable" has been in state and federal regulatory statutes and decisions the past fifty years. For that entire period neither this Court, nor any other court, has had the slightest doubt as to the purpose and meaning of that phrase. Until *now* no court has even suggested that "fair and reasonable" encroaches upon or is inconsistent with the principle of "fair value."

Thus, this Court now appears to hold, not in accordance with the belated Commission discovery in 1941 of its alleged statutory authority but to the same end, that "fair value," for fifty years the law of the land, is at this late date *an impossible concept*. This viewpoint, when presented to Congress by the Federal Power Commission at the time of the enactment of the Federal Power Act, was flatly rejected by Congress. (Note: *Section 6* of the Natural Gas Act is an identical reenactment of *Section 208* of the Federal Power Act.) But despite the Congressional dissent and declaration that it intended *not to change* that principle of law, four Justices of this Court, in the controlling opinion in the *Hope Natural Gas Company case*, nevertheless apparently consign the principle of "fair value" to oblivion. If this is the meaning and effect of that opinion, it is a clear usurpation of the legislative function of Congress, in that Congress, after extensive consideration, *expressly* and *specifically* refused to discard "fair value" and substitute the "prudent investment" theory of rate base therefor.

5. The Commission Determination of "Original Cost" Is Not the True or Entire Original Cost of Petitioner's Property and Business.

The Commission, *among other things,* eliminated all elements of engineering design and construction from its so-called "original cost" without either mention, consideration, or finding with respect thereto *(Op. Comm., V. 1, pp. 52-53, 59).* The Court, however, notices and then brushes aside petitioner's objections without regard to relevant facts and controlling law *(Op. Ct., V. 2, p. 1109).*

The burden admittedly was on the Commission to establish *by evidence* that the rates of petitioner were unreasonable *(R. V. 1, p. 79).* In arriving at such final conclusion it was necessary for the Commission to ascertain and fix a rate base. This it undertook to do, so it is said, through evidence of "original cost" only.

In passing, again it is pointed out that the assertion by the Commission that the difference, sought to be explained by it, between "original cost claimed by the Wyoming Company " * * * "and that allowed herein" is only $42,236, *(Op. Comm., R. V. 1, p. 59),* is not true *(R. V. 1, pp. 242-245. V. 3, Comm. Ex. 199, Sheets 38-39).* The difference is $129,600, which would produce an annual return of $7,500, a substantial amount to this small company, being about 9% of the total net revenue allowed in the Commission order *(R. V. 1, p. 78). And this deprivation will occur in each and every year hereafter.*

The Commission result, after deducting an amount labeled "accrued depreciation", and certain deductions of alleged customer contributions, and adding working capital and plant additions, was described by the Commission as prudent investment, and adopted by it as the rate base. In this rate base (aside from other eliminations from actual and book costs) there was included no amount whatever in any form for engineering design and construction. The evidence to this effect is clear and uncontroverted; in fact it was unwillingly given on cross-examination by the Commission witness who prepared and presented the Commission evidence of "original cost" *(R. V. 1, pp. 203, 287-288, 297).* It is a fact of common knowledge, of which we assume this Court must take judicial notice, that a natural gas pipe-

line system does not and cannot springs into existence without engineering design and construction. So here we have an original cost estimate, which did not include, and which it was deliberately intended should not include, these necessary elements of cost in any amount. These elements of cost were eliminated in their entirety because the service contract under which such essential services were furnished was with an affiliate *(Op. Ct., R. V. 2, p. 1109)*. The elimination of the contract charge for such services does not discharge *the basic duty still resting upon the Commission to ascertain the entire original cost of the plant and business of petitioner,* including these necessary items of cost, whether shown on the books or not, and without which the system could not have been built. To state, "There was no showing satisfactory to the Commission that any engineering services were rendered," *(Op. Ct., V. 2, p. 1109)* is to "ignore realities." *Again we say, the system could not have been built without such engineering services.* Further, the books of the Company showed the contract and the payments made thereunder. The presumption is that Company expenditures are made honestly and in the exercise of reasonable judgment and that the books of the Company are correct (upon which presumption the Commission several times has relied in this record), in the absence of evidence to the contrary *(Matter Portland Gen. Elec. Co.,* 1 P.U.C. 161, 166; *Missouri ex rel. Southwestern Bell T. Co. v. Public Service Comm.,* 262 U.S. 276, 43 Sup. Ct. 544; *New York v. Richmond Gas Co.* (N.Y.), 23 P.U.R. (n.s.) 465, 480). Also, there is specific evidence that services were rendered under the contract in question by two qualified engineers *(R. V. 1, pp. 201-202)*. The Commission does assert authority under *Section 6(a)* of the Act to ascertain and determine when necessary in rate cases facts not shown by the records of the company, such as here, the reasonable cost or value of the essential design and construction engineering. *(In the Matter of Chicago District Elect. Generating Corp.,* 39 P.U.R. (n.s.) 263).

It seems, too, as stated by this Court in the *Hope Natural Gas Company* case, "Its rate making function, moreover, involves the making of 'pragmatic adjustments'," that is, practical adjustments of values or consequences to produce equitable results, as indicated by the facts and circumstances of each case.

It is to be observed that all payments upon the service contract with its affiliate, for engineering design and construction aggregating in excess of $83,000, were made many years before the passage of the Natural Gas Act, and all but about $5,000 thereof *(R. V. 3, Comm. Ex. 199, p. 7)* before the decision (1930) in *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133, cited and relied upon by the Court of Appeals to support the Commission action in "adjusting" all engineering design and construction *out* of its "original cost." (See *Alabama Power Co., Licensee*, P.U.R. 1932 D, 345, 354; *Re East Ohio Gas Co.*, 1 F.P.C. 586, 593, 594.) (See, also, *Appendix C, pp. 13-a, 14-a, post).* That decision is not authority for the denial of engineering design and construction costs. It relates solely and alone to the affiliate contract price therefor. The reasonable cost or value of these essential elements, however determined, remains a part of plant cost or value. In considering the propriety of and the equity requiring "pragmatic adjustments," this Court in *Los Angeles Gas and Electric Corp. v. Railroad Comm.*, 289 U.S. 287, 307, 53 Sup. Ct. 637, 644, declared, "The time and circumstances of the outlay, and the effect of altered conditions, demand consideration." The meaning of this is that common fairness must be accorded, in the light of the conditions existing when the payments were made.

The denial of a *reasonable* amount, usually fixed by courts and commissions at 5% (*Kings County Co. v. Prendergast*, 7 F. (2d) 192; *Wisconsin Tel. Co. v. Public Service Comm.*, 287 N.W. 122; 30 P.U.R. (n.s.) 65, 85; also, the Commission practice in Pennsylvania, Texas, New York, West Virginia, Ohio, Missouri, Kansas, Oklahoma, Montana), to cover this necessary element of plant cost, plainly is unjust and operates to deny to this petitioner any return thereon, *for all future years* beginning with the effective date of the Commission order. This result is a substantial deprivation of property, "reached arbitrarily and capriciously." (See, *Penn. Power and Light Co. v. Fed. Power Comm.* (C.C.A. 3), 139 F. (2d) 445, 449; *American T. & T. Company v. United States*, 299 U.S. 232, 240, 57 Sup. Ct. 170, 174.)

In disallowing all charges for essential engineering design and construction, the Commission, and the Court of Appeals as well, on the face of the record acted arbitrarily. Such violation of the accepted principles of ordinary fair-

ness cannot be condoned or explained away by mere language or by resort to the protecting aegis of asserted non-confiscatory "total effect."

"Cost", under the Commission concept and practice, is merely an accounting exercise. But costs cannot be created or determined by the theories and procedures of accountants. *Cost is an independent fact.* Nor can actual costs legally be reduced or eliminated by the refusal of the Commission and its staff to see them. (See dissenting opinion *Mr. Justice Jackson; Hope Natural Gas Company* case.)

6. The Commission Fixation of "Service Life" Is Not Supported by "Substantial Evidence."

The Court of Appeals in its treatment of "depreciation" *(Op. Ct., R. V. 2, pp. 1114-1116)* reiterates the words, the assertions, and the contentions of the Commission. However, it fails to accord even passing reference to *the basic fact* of "service life." The Commission so-called determination thereof is without supporting evidence in the record.

The one issue presented here and now is that the "service life" adopted by the Commission is not supported by evidence. Service life is a fact and can be ascertained only *by evidence*. In the "absence of such evidence" that substantial and important fact is not established. *The record in this case "shows the absence of such evidence."* It is immaterial, therefore, what type of evidence or method of proof the Court of Appeals considered appropriate *(Op. Ct., R. V. 2, p. 1115)*. There is nothing of probative value in this record as to service life under any theory.

It is not here material or in issue whether "the Commission adopted the service life *principle* for determining annual and accrued depreciation * * *," or that this Court approves that principle. Before that principle can operate it must have a foundation upon which to function. It is essential that the Commission under its burden of proof establish as a fact the service life of the property and system of this petitioner. *As to this both Commission and Court of Appeals are silent.*

The Commission declared "accrued depreciation" to be $395,900, based upon a synthetic accounting computation from the assumed "service life" of its witness *(R. V. 4, pp.*

65-66). The Commission statement "No serious controversy arose over the *estimated* service lives * * * *other than main line pipe*" (which represented 80% of physical plant costs *(R. V. 3, Ex. 11k, St. No. 4)* is not true. The Commission offered no evidence whatever of physical deterioration of plant. The Company evidence, based on extensive studies, showed accrued depreciation of $135,206, *producing the very considerable difference of $260,000 (15% of total plant cost) (R. V. 1, pp. 381-395).*

The Commission staff witness who prepared and presented the one-page summary conclusions of "Composite Service Life" *(Comm. Ex. 200, R. V. 3)* was offered as an "expert." The testimony of this witness, *the sole Commission witness on the subject*, was "expert opinion" so-called. This witness testified, precisely as stated by the Court of Appeals in condemning the testimony of a witness for the petitioner on the subject of "going concern value" *(Op. Ct., R. V. 2, p. 1112).* "* * * that he did not employ any mathematical formula in arriving at his conclusion as to amount, and he admitted that it was only a judgment figure." The law, however, does not condemn "expert opinion" testimony. But under all the authorities the probative value, *if any*, of the ventured "judgment" depends upon the foundations for the conclusions offered, as disclosed by the record. The affirmative disclosures of this record are compelling. *The Commission witness in question admitted time after time on cross-examination that his conclusions were nothing more or less than speculative guesses or conjectures (R. V. 1, pp. 468-503).* This Court is asked to examine this evidence, for the *unsupported* and therefore illegal conclusions of the Commission "expert" substantially injure this petitioner.

The conclusion of the Court that "there is no basis in this record on which it can be concluded that the determination of depreciation adopted by the Commission will result in any of these orders in its entirety causing a failure to restore the capital investment at the end of the term, and therefore no depreciation of property is involved" *(Op. Ct., R. V. 2, p. 1115),* is founded in neither fact nor law. As a factual matter, the wholly unsupported, arbitrary and grossly inaccurate conclusions of the so-called "expert" are upheld. Such procedure necessarily serves to dispense entirely with any review whatever of "the finding of the

facts," (even when the record is barren of facts, as here) from which any such conclusion must stem.

If Commission and Court, ignoring the statutory requirements of "substantial evidence" and the burden of proof, can thus "conclude," what occasion can there be for any factual evidence whatever? The actual result is that the reviewing Court, declaring itself to be impotent, is powerless to correct any error, no matter how gross. If the Court of Appeals, as here *without evidence*, lawfully can seal the record and declare by way of finality that "in its entirety" the order does not involve deprivation of property, then all review is "gone with the wind." In such fashion the entire question of "service life," from which by mere mathematical computation the so-called "accrued depreciation" of the Commission results, is eliminated from consideration and from this case. The effect, of course, is that the review becomes purely perfunctory and a mere idle gesture. Having banished "the facts before it" and divorced them utterly from the "total effect," so-called, contrary to the mandate of Congress, there remains nothing to review, for other errors of law similarly are cast "into the outer darkness." And so the right of review expressly granted by the Act *(Sec. 19(b))* is repealed by emasculation, Congress not participating.

7. The Rejection by the Commission of All "Going Concern Value" Is Contrary to the Evidence and Erroneous in Law.

The discussion by the Court of this subject *(Op. Ct. R. V. 2, pp. 1111-1112)* is merely an enlargement and along the same vein as the summary disposition of "going value" by the Commission *(Op. Comm., R. V. 1, p. 68)*, except that the Court of Appeals, as of necessity under the law (citing numerous decisions of this Court), recognized and stated that "it is an element for appropriate inclusion in the rate base."

The Court of Appeals in affirming the Commission action disallows it on two grounds, to-wit: (1) "The record fails to *indicate affirmatively* whether the element was *indirectly reflected* to any extent in other items and in the *appraisal* of other properties as part of the assembled whole." But in any event, there is no basis on which to rest the conclusion

that the failure of the Commission to *state separately* and add an amount as going concern value overstepped the limits of due process," and (2) The expert witness of petitioner on this subject "stated that he did not employ any mathematical formula in arriving at his conclusion as to amount and he admitted that it was only a judgment figure" (Emphasis added). *(Op. Ct., R. V. 2, p. 1112).*

These conclusions of the Court we will now consider in their order of statement.

The record does "indicate affirmatively" that this "element" is not directly or "indirectly reflected" in any manner or at all in the Commission rate base. And there was no "appraisal of other properties as part of the assembled whole" as intimated by that Court. The evidence so disclosing is uncontroverted and is found in the testimony of Commission witnesses *Vaught* and *Smith* on cross-examination. The witness *Vaught* specifically testified *(R. V. 1, pp. 203, 288, 297-298)* that no item of any kind in any amount "covering designing and construction engineering" was included in the Commission evidence of plant and property *(Comm. Ex. 199, R. V. 3).* This exhibit *(No. 199)* included and totaled *only* the book costs of *specific items of property* (the actual cost of some items of property were "adjusted," that is, eliminated in whole or in part by the witness). The totals in this exhibit so prepared and received in evidence *(Comm. Ex. 199, p. 37, Line 12, R. V. 3)* were adopted as the rate base by Commission witness *Smith (Comm. Ex. 202, St. 37, p. 10, Line 1, R. V. 3),* and thereafter by the Commission in its order (with certain specific adjustments) as the "original cost" of petitioner's plant and property *(Op. Comm., R. V. 1, p. 39).*

On cross-examination the Commission witness *Vaught* testified:

"Q. Have you covered anything in your figure except the bare bones, physical property, and the capitalized overhead in relation thereto?

"A. No, we have included only what we have determined to be original cost.

"Q. Bare bones?

"A. That's right."

(R. V. 1, p. 297.)

It cannot be maintained *on this record* that the element of going concern is directly or indirectly reflected in any amount or at all in the Commission rate base. The uncontroverted evidence by the Commission itself is to the contrary. This error, therefore, so readily disposed of by the Court of Appeals on the ground that "the failure of the Commission to state separately" that element, did not overstep "the limits of due process," obviously on the record is not liquidated. It is quite impossible "to state separately" the amount of an item or element which deliberately and expressly is excluded "in its totality" from the Commission rate base.

It is not essential to state it "separately," if it may be rationally concluded that going concern was given its proper weight in the over-all appraisal. *Per contra* upon the affirmative and uncontroverted showing as here, that the element was not included in any manner, the action of the Commission is purely arbitrary and oversteps "the limits of due process."

Just what weight the Court can attach to its second ground of disallowance of "going concern" is not at all clear. Opinion testimony of an expert is evidence, under the law *(North Dakota v. Minnesota,* 263 U.S. 365, 385, 44 Sup. Ct. 138, 143; *Columbus Gas & Fuel Co. v. Public Utilities Comm.,* 292 U.S. 398, 413, 54 Sup. Ct. 763, 770). The qualifications of petitioner's witness are not and cannot be denied *(R. V. 2, pp. 601-602).* They are not questioned. But it is said in condemnation that his testimony as to the *amount* of going value *(not the fact,* which the Court concedes) was not based on "mathematical formula" and was "only a judgment figure." True! Necessarily true! And supported by many decisions *(Los Angeles Gas and Elec. Corp. v. Railroad Comm.,* 289 U.S. 287, 53 Sup. Ct. 637, 647; *United Gas P. S. Co. v. Texas,* 303 U.S. 123, 134, 58 Sup. Ct. 483, 489). The probative value of such evidence properly is the subject of inquiry and analysis, however. That the testimony of this witness of petitioner had probative valu is not traversed by Commission or that Court.

Without contradiction, the evidence shows: (1) "an operating, assembled and established property," (2) "functioning with a trained personnel," (3) "a co-ordinated plant and property," (4) "with customers attached," (5) "its business established" *(United Gas P. S. Co. v. Texas, supra)*, (6) "earning money" *(Los Angeles Gas Corp. case, supra)*, (7) past and present "earning power," (8) "credit," (9) "public relations," (10) "territory served," (11) "future growth," and (12) high "operating efficiency and standard of maintenance," etc. *(McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 413-414, 47 Sup. Ct. 144, 149-150). The suggestion that the conclusions as to "going value" are "based purely upon conjecture" proves nothing and obviously is contrary to the record in the light of the evidence directly responsive to and establishing the elements of such value as enumerated by this Court.

Paradoxically, however, and without inquiry or analysis thereof, the "opinion" testimony of the Commission witnesses on "service life," not based on "mathematical formula" and concededly "only a judgment figure," is adopted by that Court without comment, even though all probative value of that testimony is seriously controverted by this petitioner *in reliance upon the uncontroverted record testimony of that Commission "expert" himself.*

Going concern is a fact, a property right and a part of the property of the petitioner upon which it is entitled to make a fair return *(Op. Ct., R. V. 1, p. 1111)*. If the amount thereof in dollars, as offered in evidence by the petitioner be questioned, the duty obviously rested on the Commission under its burden of proof and other well settled rules of orderly procedure, to controvert petitioner's witness by competent evidence. This the Commisison failed to do, electing rather to condemn it as a matter of law, on the asserted authority of "this Commission and regulatory agencies in general" *(Op. Comm. R. V. 1, p. 68)*, thus to remake the law.

8. The Commission So-Called "Allocation of Cost of Service" Is Without Support of Substantial Evidence and in Disregard of Law.

On this topic also the Court of Appeals merely repeated and approved the assumptions and conclusions of the Commission. It is obvious from the opinion *(Op. Ct., R. V. 1, pp. 1112-1114)* that the Court of Appeals made no analysis of "the facts before it" or of the existing principles of law presently requiring and controlling "allocation of property." And here, as elsewhere, the same formula denying review is resorted to, the Court concluding "it cannot be said 'the order' in its totality produces arbitrary results or oversteps the bounds of due process". *(Op. Ct., R. V. 1, p. 1114).*

The necessity for the apportionment or allocation, according to use of the property, and the revenue and expenses thereof, arises from the intrastate and interstate character of the Company system and operations, and the priority in fact and in law of domestic service and customers over industrial service and customers. *Such allocation is a requirement of law.*

Simpson v. Shepard, 230 U.S. 352, 33 Sup. Ct. 729;

Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 51 Sup. Ct. 65;

Columbus Gas & Fuel Co., v. Public Utilities Comm., 292 U.S. 398, 54 Sup. Ct. 763;

Wabash Valley Elec. Co. v. Young, 287 U.S. 488, 53 Sup. Ct. 234.

The very fundamental problem of allocation here involved is by no means a simple one. "While the difficulty in making an exact apportionment of the *property* is apparent, and extreme nicety is not required, only reasonable measures being essential * * *, *it is quite another matter to ignore the actual uses to which the property is put.*" (*Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 150-151, 51 Sup. Ct. 65, 69.) The Court of Appeals, apparently with approval, adopted the Commission conclusion "that it did not follow * * * that an allocation of physical property or portions thereof must be made before any excessive returns were determined" *(Op. Ct., R. V. 1, p. 1113)*. This

conclusion is directly contrary to *Simpson v. Shepard, supra*, 33 Sup. Ct. 729, 764-765. *In fact*, the Commission made no allocation whatever of the property of the petitioner or any part thereof either before or after so-called "excessive returns were determined." The Commission in that behalf declared, "All that can be accomplished by an allocation of physical properties can be attained by allocating costs *including the return*" *(Op. Comm., R. V. 1, p. 80)*, and proceeded accordingly. The Commission thus definitely distinguishes "allocation of physical properties" from "allocating costs" and, rejecting the former, the law of the land, it sets up its own law of the case. Such formula it *asserts* by way of justification is "most practical and businesslike." These Commission statements are mere assertion. Nor are there any findings—merely argumentative hand-waving conclusions *(Op. Comm., R. V. 1, pp. 82-83)*. It cannot be determined by the Court or by anybody else on this record "other than by sheer acceptance of the Commision conclusion, in the form of its statement of the result and the cryptic formulation" of result, what, if any, are the factual foundations therefor. See *Eastern-Central Assn. v. United States*, ... U.S. ....., 64 Sup. Ct. 499, 507, and *Alabama Power Co. v. Fed. Power Comm.*, 136 F. (2d) 929, 932-933.

No finding, no explanation, no computation and no other disclosure is made as to the manner by which the Commission (under its own illegal theory of eliminating all allocation of *property*) arrived at its *modified* "Allocated Costs" *(Op. R. V. 1, pp. 82-83)*. We are simply told categorically, and in effect, "here it is, like it." Such a course of action characterizes itself. This issue is a matter of such consequence and complexity that no real function of review can be performed without the requisite foundation that has not been laid in this case.

The Circuit Court of Appeals for the Fifth Circuit recently had occasion to deal with the same character of arbitrary formularly procedure by this same Commission. We quote from the opinion of that Court:

"We are not prepared to affirm with the easy confidence exhibited by the majority of the Commission that

we fully understand the formula and its application, both because the Commission does not undertake to explain it, contenting itself with saying, 'The record disclosed the formula for making such determination which was fully set forth and explained by the staff accountant at the hearing,' and because the Commission in finding the value has completely departed from the formula and used a sort of catch as catch can theory of having one hand wash the other. We are prepared, though to say that if the formula is a sound one and applicable for the settlement of the controversy, as the Commission's words affirm, its acts deny, it should be so applied and not be abandoned for an entirely different theory, while, if it is not a sound one, it has no place in the determination of the issue presented. While not prepared then to hold, in the present state of the record, that petitioner's theory of solution is a correct one, we are in no doubt that the Commission's disposition of the item is erroneous, that it amounts to no more than guessing off a substantial item of value, and that its finding in respect to it must be reversed and the matter referred back to the Commission for the proper determination of the credit to be allowed."

Alabama Power Company v. Fed. Power Comm. (C.C.A. 5), 136 Fed. (2d) 929, 932-933.

We start then with the admitted fact that there is no "allocation of property" in this case.

Yet the Court of Appeals apparently overlooked or misconceived the distinction in fact and law between "allocation of property" and "allocation of costs" also described as "allocation of cost of service," for the opinion states: "The separation may be appropriately effected by estimating or appraising the value of *the property used in the regulated business and that used in the unregulated business. Smith v. Illinois Bell Telephone Company*, 282 U.S. 133" (*Op. Ct., p. 25*). (Emphasis added) Then it is said by the Court, "The separation or allocation may be effected by application of *any formula* which makes the principle a working one suitably adapted to the particular circumstances," citing *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U.S. 398. (Emphasis added) If by "any

formula" the Court means the Commission lawfully may promulgate, and the Court is at liberty to approve, a formula which discards "allocation of property" and substitutes therefor "allocation of cost of service," then that Court is not supported by the *Columbus Gas & Fuel Co.* case cited by it, or by the other controlling decisions, none of which have been overruled.

In the cited case the Court, speaking through *Mr. Justice Cardozo*, emphatically held that allocation of property is essential and that any procedure omitting such allocation is arbitrary. We quote:

> "• • • *The value of the property devoted to transmission may be measured upon the basis of mileage multiplied by demand.* United Fuel Gas Co. v. Railroad Comm. of Kentucky, supra, where the experts are stated to have agreed upon the method of division. *This does not mean that a like basis will be approved when mileage contributing to the* supply is omitted from the reckoning." (Emphasis added.)
>
> *Columbus Gas & Fuel Co. v. Pub. Utilities Comm.*, 292 U.S. 398, 408-410; 54 Sup. Ct. 763; 768-769.

In *the Minnesota Rate Cases*, in which allocation of property was held essential, this Court also directly repudiated the Commission principal of "*allocating costs including the return.*" The case of *Simpson v. Shepard* has not been overruled. We quote from that opinion:

> "*The value of the use, as measured by return, cannot be made the criterion when the return itself is in question.* If the return as formerly allowed, be taken as the basis, then the validity of the state's reduction would have to be tested by the very rates *which the state denounced as exorbitant.* And, if the return as permitted under the new rates be taken, then the state's action itself reduces the amount of value upon which the fairness of the return is to be computed.
>
> "*When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue*, and this must be found in the use that is made of the property. That

is, there should be assigned to each business that proportion of *the total value of the property* which will correspond *to the extent of its employment in that business*. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments, respectively, the property *exclusively* used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common." (Emphasis added.)

Simpson v. Shepard, 230 U.S. 352; 33 Sup. Ct. 729, 765.

The necessity for *property* allocation likewise is explicit in the case of *Smith v. Illinois Bell Telephone Co., supra:*

"In view of the questions presented in this case, the validity of the order of the state commission can be suitably tested only by an *appropriate determination of the value of the property employed in the intrastate business* and of the compensation receivable for the intrastate service under the rates prescribed. Minnesota Rate Case, 230 U.S. 352, 435, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L.R.A. (N. S.) 1151, Ann. Cas. 1916A, 18. *As to the value of that property*, and as to the revenue and expenses incident to that business, separately considered, there should be specific findings. Railroad Commission v. Maxey, 281 U.S. 82, 83, 50 S. Ct. 228, 74 L. Ed. 717." (Emphasis added.)

Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 149, 51 Sup. Ct. 65, 69.

It is clear, therefore, that "the requisite separation" may not be made by "an allocation of cost of service," even though it be asserted that "all that can be accomplished by an allocation of physical properties can be obtained" by the Commission-made law of so-called "allocation of cost of service."

The underlying "factual" assumptions of the Commission

are not relevant or related to this petitioner under any theory of allocation, and are not suported by but contrary to the record.

We now turn to the factual treatment of allocation by the Commission. Exhibit, entitled "Colorado-Wyoming Gas Company, Allocation of Cost of Service, year 1939" (*R. V. 3, Ex. 227.*) was presented by Commission witness *Lyon*, an engineer in the employment of the Commission (*R. V. 2, pp. 711-716, 728-790*). The witness, in that exhibit, and the Commission, in its opinion and order, disregarded entirely the statutory limitations upon the rate-regulatory authority of the Commission (*R. V. 3, Ex. 227; V. 2, p. 726, V. 1, pp. 79, 82-83*). The witness and the Commission similarly ignored and discarded the basic characteristics of the construction and operation of the Colorado-Wyoming Company system; to-wit: the "priority" rights of domestic and commercial consumers over industrial consumers; the "shut-off" and "curtailment" provisions to enforce that priority; the frequent, continuous and increasing resort to such "shut-off" and "curtailment" provisions to meet and satisfy the peak-day demands and requirements of the domestic and commercial service; the actual use of and necessity for the total system capacity to care for such preferential rights; and the growing volume and increasing peak demands for gas by customers in the preferred domestic and commercial class.

(R. V. 2, pp. 728, 730-732, 736, 738, 740-741, 762, 771-773, 785, 786, V. 1, pp. 80-81, 82.)

The Commission *(Op. R. V. 1-p. 82)* implicitly states that the "peak day" (February 9, 1939) adopted by it as its basis of allocation as between classes of customers was the peak day of Colorado-Wyoming Company. It also states that on that day "the domestic demand reached its maximum." Actually, the foregoing statements are contrary to the uncontroverted facts. February 9, 1939, was the day of "peak-day delivery" by Colorado Interstate Company. Such day, however, does not represent the total peak-day deliveries of gas to or deliveries by Colorado-Wyoming Company system, or the peak-day deliveries to its industrial and its domestic and commercial customers, or either thereof, in

1938, or in 1939, or in 1940 (*R. V. 3, Comm. Ex. 226, Table 2, Line 28; R. V. 1, pp. 142, 186-7, 358; V. 2, pp. 728, 735-736, 734*).

No basis or reason has been offered by the Commission to explain why or how the peak-day deliveries of the Colorado Interstate Gas Company system can be used instead of the peak day of Colorado-Wyoming Company system to apply the allocation required in this case. There is no justification whatever for the Commission action. The result is not an allocation of the operations of this Company in fact or in law, under any theory.

Most of the figures as to M.c.f. deliveries of gas, in *Tables 1, 2 and 4, Exhibit 226* (*R. V. 3*), insofar as they purport to relate to Colorado-Wyoming Company, and in *Tables 1 and 2, Exhibit 227*, Commission Allocation, Cost of Service, Colorado-Wyoming Gas Company (*R. V. 3*), are not accurate nor do they actually or approximately relate to that which they are stated as representing. Moreover, they are averages or guesses or the combination of both.

(*R. V. 2, pp. 735-739, 742, 743, 746-748, 748-751, 756-758, 760-762, 764-765, 771.*)

It is declared by the Commission (*Op. R. V. 1, pp. 82-83*) that it used the demand of Colorado Portland Cement Company, the largest industrial customer of Colorado-Wyoming Company, on the "system peak day" (*Note:* February 9, 1939, the peak day of Colorado Interstate Company system, *not the peak day of Colorado-Wyoming Company system*), in arriving at its so-called "allocation." The undisputed fact put in evidence by the Commission itself, however, is that *on that day* and during the entire month of February, 1939, no gas whatever was delivered to Colorado Portland Cement Company, so there was and could be no demand or measure of demand at that time (*R. V. 3, Comm. Ex. 308, sheet 1*).

The Company "allocation" is based upon apportionment of *property*, revenue, expenses, and income between those operations of the Company over which the Commission has rate-regulatory authority and those over which it has no such authority. Such allocation is based upon the separation of jurisdictional and non-jurisdictional operations and

upon the principle of "peak responsibility" resulting from the priority, in fact and in law, of domestic consumers over industrial consumers (*R. V. 1, pp. 639-672, 706-711*). Of course, the question involved in this review is not whether the Company allocation is correct (which we believe it to be) but as to the basic accuracy, reasonableness, understandability and legality of the Commission procedure. The burden was on the Commission.

In 1935, when the Federal Power Commission appeared before Congress with its legislative proposal, *Section 211 (a)* as drafted (which as changed by Congress became *Section 208* of the Federal Power Act and 6 (*a*) of the Natural Gas Act), Congress was told certain things. Those who presented the Commission position (*Appendix C, pp. 8-a-9-a, post*) declared that the section in question "fits right into the picture of the separation of this property between state and interstate use" and specifically that "we (the Commission) know of no way of dividing it other than that specified by the Supreme Court of the United States in the Minnesota rate case * * *" (*Appendix C, p. 17-a, post*). Forgotten, of course, is this recognition of the law of allocation as the law then was and as it now is. Congress, as pointed out, rejected that "program" of the Commission for "the development of the social and economic stability of the United States" (*Appendix C, p. 12-a, post*), largely embodied in *Section 211 (c)* of the draft (as is clearly evident throughout the testimony of *Commissioner Seavey* and *Solicitor DeVane* of the Commission. Hearings before Interstate Commerce Commission, H.R. 5423, Part 1, March 7, 8, 9, 12, 13, pp. 382-576), by striking it from the Act in its entirety (*Appendix D, p. 20-a, post*). The Commission, as the record of events now unmistakably discloses, nevertheless proceeded with its non-statutory "social and economic" objectives. To facilitate realization of its declared objectives, allocation of property (as well as disregard of jurisdictional limitations, evidence and the controlling law of the land) thus *deliberately* was cast aside and repudiated. Such procedure is not merely contrary to law, it is destructive of the *ordered* and orderly processes of government binding upon the executive, the administrative and the judiciary as well as the citizen.

It is, of course, entirely clear, from the Commission opinion (*Op. R. V. 1, pp. 79-80, 82-83*) that the foundation and basis of the Commission allocation is not disclosed, and that the basic and responsible findings required by law are absent. Neither the Court nor anybody else can, by examination of the opinion, ascertain or even approximately guess the facts relied upon by the Commission or the technique and method of computation employed by it. The staff, "principles and methods," the Commission declares, "*are adopted with the modification* that the coincident demands of all customers on the system peak day (*Note:* Not of Colorado-Wyoming Company) are used, and with exception of deliveries to Highway Gas Company" (*Op. R. V. 1, pp. 82-83*). How and in what manner the technique, method and computations of Commission staff witness *Lyon* (*Comm. Ex. 227, R. V. 3*) were altered or changed, by the so-called "modification," is not disclosed or discernible. There are no findings. The Commission states that the modification was made, next states the final result, and nothing else. However, it is entirely clear that the jurisdictional restraints of the Natural Gas Act are disregarded and the established principles of law governing allocation are discarded. In defense, the Commission offers a substitute, which as is usual with those who offer substitutes, it declares is "just as good" as the real thing.

United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 62 Sup. Ct. 722;

United States v. American Trucking Assn., 310 U. S. 534, 60 Sup. Ct. 1059;

Alabama Power Company v. Federal Power Comm., supra;

Morgan v. United States, 298 U.S. 468, 479-481, 56 Sup. Ct. 906, 911-912.

All references and contentions as to earnings and percentages of return of Colorado-Wyoming Company, relate (1) to all Company operations, that is to say, to non-jurisdictional as well as jurisdictional business, as to the former of which the Commission has no rate-regulatory authority whatever, and (2) as applied to the illegal so-called "actual legitimate cost"—"prudent investment" rate base sired by the Commission contrary to "the law of the land." The Com-

mission arguments indulged with respect to such earnings and return, so predicated, therefore have no probative force and effect whatever, even under the "total effect" doctrine of this Court. This is true for under the Natural Gas Act the profits derived by this Company from non-jurisdictional operations are no part of the business of the Commission (Cf. *Bd. Pub. Utility Commr's v. New York Telephone Co.*, 271 U.S. 23, 31-32, 46 Sup. Ct. 363, 366). Moreover, the amounts and percentages thereof are relevant only after there has been a legal determination of total plant and property value, revenue and revenue deductions, and after proper allocation of plant, property revenue and expenses, as required by law.

The controlling legal requirement of "property allocation" is *no mere method*. Nor is "the absence of substantial evidence" a mere defect or imperfection of method. These are fundamental and strip *this* Commission action of all basic validity and legality. It is perfectly obvious that "allocation" reaches the very heart of and controls directly the amount of the order of reduction herein involved. Whatever may be said, the stern fact cannot be dislodged that no order of reduction can stand even with the aid of the fiction of "total effect," if as here neither the basic foundation of facts nor warrant of law is present.

As a corollary to the general subject title of allocation the attention of the Court is addressed to *the Commission allocation of the ordered reduction*.

The Commission distribution of the rate reduction of $119,000 ordered, as between distribution companies served (*Op. Comm. Exhibit B, R. J. 1, p. 85*), is based upon tabulations of revenues received from such companies in 1939 (*Comm. Ex. 202, Schedule B-16, pp. 32, 34, 35*). The so-called "average revenue Mcf." is the total of all revenues received from each distributing company, divided on a total annual volumetric basis, without regard to the actual deliveries for and revenues received from the domestic, commercial and industrial classes of consumers, respectively. The difference in the price of gas to such classes of consumers, charged by Colorado-Wyoming Company and the respective distributing companies, is ignored. This method of procedure produces

confusion and highly discriminatory "city gate" rates, without justification in fact or in law, as follows:

	1939	
	Actual	Comm. Order
Cheyenne Light, Fuel & Power Co. (Cheyenne, Wyoming)	37.8c M.c.f.	24.6c M.c.f.
Public Service Co. of Colorado (Denver fringe, Golden, Boulder, Longmont, Brighton, Loveland, Fort Collins, etc., Colorado)	37.5	30
Greeley Gas & Fuel Co. (Greeley, Colorado)	37.9	22.7

Commission *Exhibit 50 (Appendix B, p. 5-a, post)* discloses the relative location to petitioner's source of supply of the communities and areas served. Reference thereto, it is submitted, fully demonstrates that such a rate structure is both arbitrary and impossible.

> "When using average figures for the purpose of reaching general conclusions, extreme care is needed. Many errors are traceable to the false assumption that average costs or revenue per unit of service determine whether one rate schedule is higher or lower than another."
>
> *Re Queens Borough Gas & Electric Co.*, (N. Y. P.S. Comm.) 39 P.U.R. (n.s.) 65, 71.

If, as contended by this petitioner, allocation is required by law, as between *Colorado* and *Wyoming* sales and as between sales for resale for domestic and commercial uses and "direct" industrial sales, the gross sales at Cheyenne, Wyoming, alone subject to the Commission's rate-regulatory authority, in 1939 were $182,152 of the total gross revenue of $828,939, for that year, that is 22% thereof *(R. V. 3, Exs. 245; St. Nos. 4 and 8)*. This result obviously presents a totally and fundamentally different proceeding, in all its factual and legal aspects, than the proceeding as adjudicated on the Commission assumptions and theories.

9. The Substance of "Due Process" Under the Fifth Amendment to the Constitution Has Been Denied to This Petitioner by the Commission and the Court of Appeals.

Commission and Court of Appeals alike brush aside also all other specifications of error, either without reference thereto or by mere discounting mention thereof. Such Commission errors are no less arbitrary but only less substantial in dollars than those specifically suggested in this petition for certiorari. The uniformity of the treatment thus accorded all questions on review simply emphasizes the "totality" of the derogation and denial of all right of review as an actual and practical matter.

This case erroneously has been treated as a mere incidental matter and scrambled into the Commission and Court of Appeals determinations of the *Canadian River Gas Company* and *Colorado Interstate Gas Company* cases, *supra*. The issues in this case are separate and distinct, in fact and in law, from the issues in those cases. As a result of the merging process indulged, several material issues herein involved are confused or are completely by-passed in silence. This procedure of the Commission and the Court of Appeals operates to deny to this petitioner the fundamental right of due and orderly process. Our criticism applies particularly to the issues of rate base, jurisdiction, "service life," allocation and due process.

To summarize: Neither facts, procedural law nor substantive law control or restrain the Commission. "Jurisdiction," both as to the extent and character thereof, is asserted contrary to the terms of the Natural Gas Act. The legal requirements of "fair value," including the value of "an assembled plant doing business and earning money," "actual accrued depreciation" and "allocation of property" are ignored. The "burden of proof" imposed by law is disregarded throughout in all aspects of the case. Uncontroverted and relevant facts are cast aside and conclusions are declared in the entire absence of factual support.

Moreover, the duty of judicial review of such Commission action, imposed on the courts by Congress, appears to have become, as construed and applied by the Courts of Appeals and this Court, "a costly time-consuming pageant of no practical value."

"Due process" is not merely a term descriptive of the requirements for and essentials of formal procedure; it is vastly more—it is "the spirit of the law," having its origin in the common law and thereafter molded into the very heart of American constitutional government. In its larger aspects, it is "the law of the land."

While a precise definition of "due process" is well nigh impossible, because of the universality of its application in the administration and conduct of government, its purpose inherent in the very structure of our system is to afford effective guarantees to security against the *arbitrary action of government.*

The Supreme Court of the United States more than a century ago, in discussing the elements and concept of "due process," then embodied in the Constitution of Maryland, declared:

> "The good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."
>
> *Bank of Columbus v. Okely* (1819), 4 Wheat. 235, 244.

A century later *Mr. Justice Holmes* described it as "the rudiments of fair play" *(Chicago M. & St. P. Ry. Co. v. Polt* (1914), 232 U.S. 165, 34 Sup. Ct. 301.)

The application of it was not abandoned to the whim or inclination of instrumentalities or agencies of public power whether created in the recent or distant past. To the courts were delegated the high honor and the solemn duty of protecting all citizens alike, through the application of this transcendently important and glorious concept of government.

Since judgment is so dependent upon and so reflects point of view, judgment uncontrolled by established and declared standards or measures becomes a menace to and destructive of orderly processes of government. Being uncontrolled it becomes fortuitous, that is to say, conditioned upon the viewpoint of that person or tribunal called upon by the accident of circumstance to judge. Congress clearly had this danger

in contemplation when enacting the Natural Gas Act, and particularly with respect to the rate-regulatory authority in *Sections 4 and 5* and the substantial right of review in *Section 19 (b)* thereof. The language of the Sections in question clearly does not delegate uncontrolled discretion.

In the very nature of things each issue or question of fact must stand or fall when measured by the evidence, if any, in proof or disproof of that particular issue or question of fact.

The general law is that *each* such issue of fact and each of the findings of fact made, or which should have been made, by the Commission or other administrative agency must be supported by substantial evidence *(Interstate Comm. Comm. v. Jersey City* (1944), 64 Sup. Ct. 1129, 1133). Its findings and determinations must be "formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves (the court) to understand, with a fair degree of assurance, why the Commission acts as it does" *(Eastern-Central M. C. Ass'n. v. United States* (1944), 64 Sup. Ct. 499, 508).

Moreover, under no theory can one issue or question of fact be offset against an entirely different and unrelated issue or question of fact. It is also elementary that the absence or insufficiency of evidence to support any particular issue or question of substantial and material fact cannot be condoned or validated by reason of the fact, if it be a fact, that another and independent issue or question of substantial and material fact is supported by "substantial evidence." The same conclusions relate as well to the determination of issues of law.

True, "the Commission's order does not become suspect" *merely* "by reason of the fact that it is challenged." But, it cannot be purified or rendered valid "in its entirety" or at all by a process of sanctification. It is not sacrosanct. Congress has otherwise ordered and in so doing "has not used meaningless words." The term "arbitrary" is, under established law, a general expression or conclusion indicating that with respect to one or more specific and material issues the administrative order, measured by the record and controlling law, is not supported by substantial evidence or

is contrary to law. A finding of unreasonableness, when justified, is merely the conclusion drawn from *all* determinations of material fact under the applicable rules of law. It has never been the law that a rate making authority may, by making a finding that certain rates are unreasonable, preclude judicial review of the evidentiary and legal foundations of such finding.

Congress in *Section 19(b)* of the Act "set out a criterion" to govern both the Commission and the courts on review, to wit: "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." This also is the holding of the Circuit Court of Appeals for the District of Columbia, in the case of *Saginaw Broadcasting Co. v. Federal Communications Comm.*, 96 F. (2d) 554, 559. (See, also pp. 558-561 and decisions of this Court cited.) (Certiorari denied.) Therein that Court, in the statutory judicial review of Commission orders under the Communications Act of 1934, 47 U.S.C.A., para. 402(b)(1) declared that "Thereby the Act has set out a criterion to govern the Commission * * *." The two review sections are identical in purpose and meaning.

That Court in that case also ably analyzed the foundations for the Congressional requirement that there be "findings of fact" to guide and control both the Commission and the courts and "the necessary content" of the essential "finding of facts." Such requirement, among other things, "is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extra legal considerations. * * * In the absence of findings of fact the reviewing tribunal can determine neither of these things." These principles, having their origin in the Constitution itself and the decisions of this Court for one hundred and fifty years, until now, abound in the insistence upon this fundamental procedure.

If then the record discloses that the Commission has proceeded without supporting evidence or without warrant of law, no conclusion which the Commission reaches upon such improper basis can convert that wrong into right. It is only after the several specific determinations of material issues of fact have been found to be supported by "substantial

evidence" and in conformity with controlling law that the court reaches the realm of "total effect" or "entirety."

"Total effect," "end result," "rate impact," and "consequences," unmeasured by material facts or controlling law, are not "due process," even in a "confiscation" case. Furthermore, if courts of review are not concerned with particular material issues as such, there is no occasion at all for the statutory review, for relief from "confiscation" is still available through courts of equity.

The "new order" of administrative finality and judicial impotency, we are told is epitomized by the decision of this Court in the *Hope Natural Gas Company* case. It is most difficult to understand what purpose now can be served by the statutory requirements of a hearing as a condition precedent to Commission or other administrative findings. Such findings to all intents and purposes are final and not reviewable, for the sole test on review, it seems, is overall effect, whatever that limitless and unmeasured phrase may mean.

In the *Hope Natural Gas Company* case, in treating of the problem presented of the underlying basis of "reason," it is said: "If the total effect of the rate order cannot be said to be unjust and unreasonable"—this is the end of the matter. Justification for this pronouncement is claimed because the Commission is not bound to the use of formulas; can make pragmatic adjustments; can meet the requirements of the Act by viewing the order in its entirety, and this because it is the result reached and not the method employed which is controlling. Nothing is settled by such a disposition of the problem. Apparently, under it, actual costs may be disregarded—items of property disallowed, and admittedly pertinent facts fail of consideration, and yet the order be sustained. Such results may not reasonably be designated as a matter of mere method and unsubstantial in character.

By such a rationale it is difficult to imagine any right of property which would not be subject to deprivation without redress. The present stated approaches of this Court are expressions of assumptions and involve circular reasoning.

If independent "end result" is the sole criterion, and this apparently is the present view of this Court, then the statute

so construed would be void because it becomes a pure delegation of legislative power.

The reasoned treatment of this question by *Mr. Chief Justice Taft* is cogent. He says:

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad *details of rate schedules* the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the *Legislature*, to prevent its being a *pure delegation* of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is *required* as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

Wichita R. & L. Co. v. Public Utilities Comm. (1922), 260 U. S. 48, 58-59, 43 Sup. Ct. 51, 55.

See, *Beaumont Sour Lake, etc. Co. v. United States*, 282 U.S. 74, 86, 51 Sup. Ct. 1, 6, and cases cited.

Now being substituted for "due process" in spirit and in fact, to the end of according "the minimum of due process," as it is called, all in the interest of convenience, speed, efficiency, etc., so we are now told by the proponents of the "new order," is the new slogan—"This we do in the public interest." These words "in the public interest," without measure or standard to control their application, of course mean whatever any official of government chooses to declare to be "the public interest." There are many, and the number is rapidly increasing, who are greatly alarmed by the obvious objectives of this apparently innocent phrase. The "public interest," whenever necessary, is declared and defined in our basic structure of government and in the laws enacted by Congress "in pursuance thereof." Therein are

found the standards governing and controlling the administration of government, without which the will of the administrator or the judge, be he benevolent, selfish, visionary or despotic, is supreme.

Validity and invalidity, legality and illegality, regulation and confiscation, due process of law and personal government cannot be made to mean the same thing by any process of attempted rationalization.

"*All legislative powers* herein granted shall be vested in a *Congress* * * *. *The judicial power* shall extend to *all cases in law and equity* arising under this *Constitution*, the *laws* of the United States * * *. *This Constitution, and the laws* of the United States *which shall be made in pursuance thereof;* * * * shall be the supreme *law of the land* * * *." (Emphasis added.) This is not theory or legislative lore. This is American constitutionalism.

CONCLUSION.

Accordingly it is respectfully submitted that the writ of certiorari should issue herein.

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APPENDIX A.

Pertinent Sections of the Natural Gas Act.

(15 U. S. C. 717.)

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES.

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

RATES AND CHARGES, SCHEDULES, SUSPENSION OF NEW RATES.

Section 4. (a) All rates and charges made, demanded or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * *

(e) * * * At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over

other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

Section 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

ASCERTAINMENT OF COST OF PROPERTY.

Section 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

ACCOUNTS, RECORDS AND MEMORANDA.

Section 8. (a) * * * The Commission may prescribe a system of accounts to be kept by such natural-gas companies, and may classify such natural-gas companies and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays or receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

REHEARINGS, COURT REVIEW OF ORDERS.

Section 19. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reason-

able grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Note:—Section 19 (b) of the Natural Gas Act is identical, word for word including punctuation, with the "Court Review of Orders" sections of the "Public Utility Holding Company Act of 1935" and the "Federal Power Act" (1935), to-wit: Section 24 (a) and Section 313 (a) thereof respectively.

APPENDIX B.

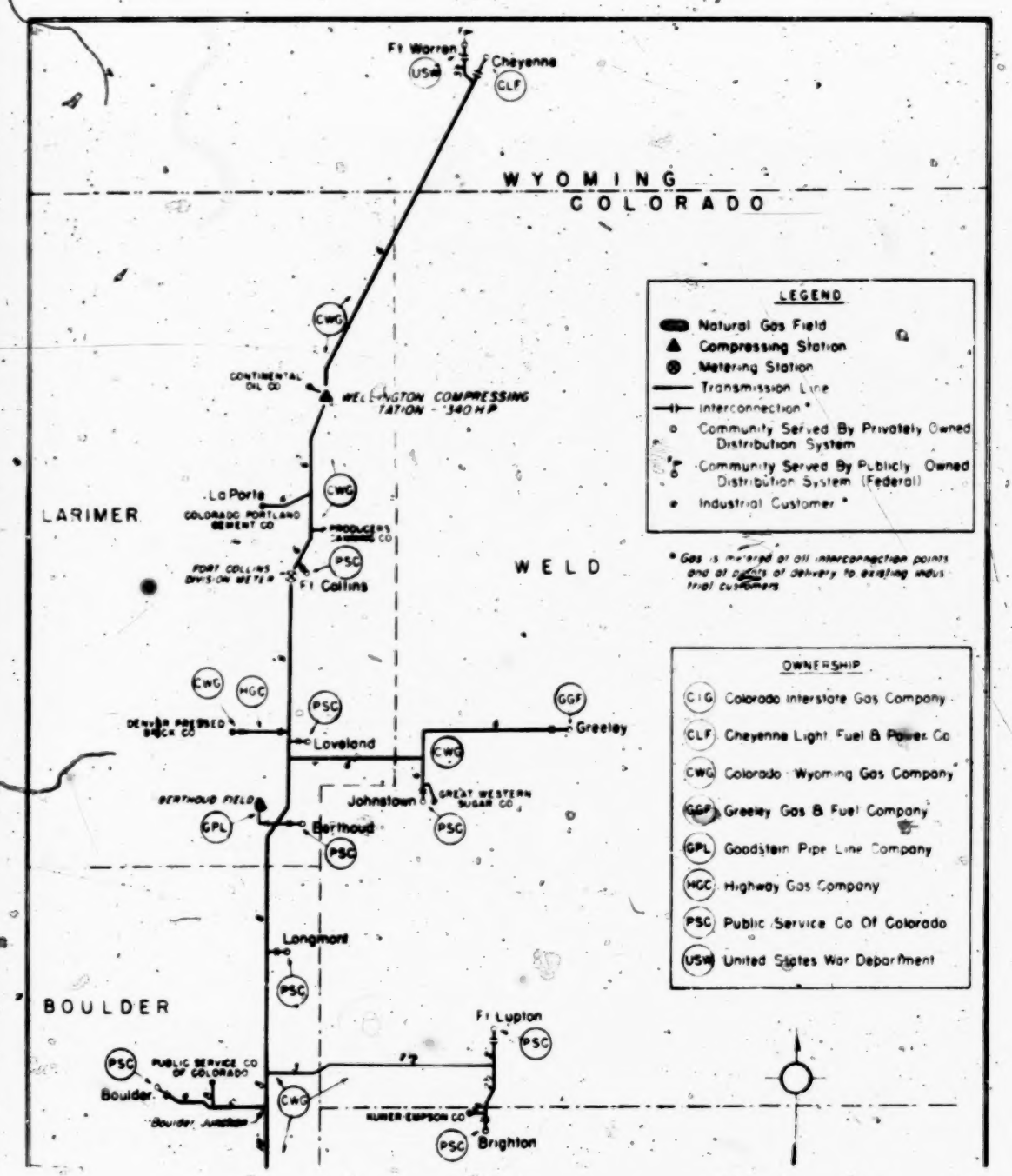


EXHIBIT NO. 50

APPENDIX C.

Excerpts From Part I.

"HEARINGS BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, SEVENTY-FOURTH CONGRESS,

FIRST SESSION,
ON
H. R. 5423

TO PROVIDE FOR CONTROL IN THE PUBLIC INTEREST OF PUBLIC UTILITY HOLDING COMPANIES USING THE MAILS AND THE FACILITIES OF INTERSTATE COMMERCE, TO REGULATE THE TRANSMISSION AND SALE OF ELECTRIC ENERGY AND NATURAL GAS IN INTERSTATE AND FOREIGN COMMERCE, AND FOR OTHER PURPOSES."

(February-March, 1935)

Testimony of *Commissioner Clyde L. Seavey* of the Federal Power Commission:

"Title II of H.R. 5423, introduced by Congressman Rayburn, is entitled 'Amendments to Federal Water Power Act.' By these amendments the present act is divided into three titles. It is provided that the present Federal Water Power Act shall constitute title I of the amended Federal Power Act. The Rayburn bill does not contain all of the sections of the present act. It includes (pp. 77 to 102) only those sections which it proposes to amend. None of these amendments to the present sections of the act is of major significance; they are made largely for the purpose of clarifying its effect in situations which have arisen in the course of its administration. A separate memorandum explaining these amendments is submitted herewith. The present analysis is devoted to the new titles which are added by the bill (pp. 103 to 141). Of these new provisions title II (pp. 103-122) contains the substantive provisions for the regulation of interstate electric utilities, and title III (pp. 122 to 141) brings together the provisions applicable to both water power licensees under title I and interstate operating companies under title II, including the general administrative and procedural sections."

(Page 384)

"Mr. Wolverton: Did you participate in the drawing of this bill?

"Commissioner Seavey: Yes; I worked on it along with many others.

"Mr. Wolverton: Who were the others?

"Commissioner Seavey: They were the legal department, our legal department, and members of the Commission, and our engineers were consulted about certain practical phases; our accountant was consulted, and generally, so far as the Commission is concerned, we took in the whole staff of the Commission.

"Now, in addition to that, together we consulted the chairman of this committee, Mr. Rayburn; discussed the policies and the provisions of the bill, and also consulted the legislative counsel and Dr. Splawn. I do not know whether I can remember anybody else or not."

"Mr. Wolverton: Did you all sit in one general group, or merely consult one another at different times?

"Commissioner Seavey: We sat in a general group a part of the time, and by several groups, that is, by smaller groups.

"Mr. Wolverton: After a title or article had been drawn, was it submitted to the Federal Power Commission for its approval?

"Commissioner Seavey: Yes; the Federal Power Commission approved of it. That is, they indicated their approval of the bill.

"Mr. Wolverton: Has the Commission approved this title as it appears in the bill?

"Commissioner Seavey: Yes; they have approved the policy and the amendments of this title. As I have explained here previously, some of this language may need to be changed in order to make sure those policies and aims are accomplished.

"Mr. Wolverton: Are the views and opinions you express here also the views of the Power Commission?

"Commissioner Seavey: Yes; as they have been expressed by the Power Commission.

"Mr. Wolverton: And, you make no qualification that you are expressing your own views and not those of the Commission?

"Commissioner Seavey: No. My own views coincide."
(Pages 400-401)

Testimony of *Dozier DeVane*, Solicitor, Federal Power Commission:

"Mr. Wolverton: Who actually sat down and drafted that language? Do you know? You know in the drawing of any bill it finally comes down to one individual or two individuals, who actually express the policies and ideas by the use of words. Who [illegible] that as to article II?

"Mr. DeVane: Commissioner Seavey and myself, of the Federal Power Commission, were the two persons to whom the Commission delegated the responsibility for this work. I would like to say, however, that to neither of us belongs the credit, if we may call it credit, for the language that is in the bill, because we have had a great deal of assistance from members of the Commission and from members of its staff. This title has been worked over very seriously and very earnestly."
(Pages 552-553)

DRAFT OF FEDERAL POWER ACT AS INTRODUCED IN CONGRESS.

TITLE II. "AMENDMENTS TO FEDERAL WATER POWER ACT" (Amendments as proposed by Power Commission, indicated by italics).

"Section 201. Section 3 of the Federal Water Power Act is amended to read as follows:

* * * * * * *

"(13) 'net investment' in a project means the actual legitimate *prudent* original cost thereof * * * "

"Sec. 4. The Commission is hereby authorized and empowered—

* * * * * * *

"(b) To determine the actual legitimate *prudent* original

cost of and the net investment in a licensed project, • • • ."

(Pages 24-25, 452)

Note: The foregoing amendments were rejected by Congress, that is, the word "prudent" was rejected by Congress.

Comment: It is important to note that when Congress did intend to authorize the untilization of a rate base other than the rate base of "fair value," it did so in language directly, expressly and unmistakably declaring such policy. Thus in the *Federal Water Power Act of 1920 (41 Stat. 1063, 16 U.S.C. 791-823)*, "the valuation" of the property of any licensee "for purposes of rate making" *(Section 20)*, as well as for acquisition thereof by the Government *(Section 14)* is expressly limited to the "net investment" which is not "to exceed the fair value of the property taken" *(Section 14)*, as defined and limited to "actual legitimate original cost" *(Section 3 (13))*. Every license issued under the Act is "conditioned upon the acceptance by the licensee" of such rate base and valuation *(Section 6)*.

This is the only instance in which Congress has supplanted the principle of "fair value." It raised no constitutional obstacle, for if any person desired to avail himself of the license privileges of the Water Power Act, he voluntarily accepts at the outset the "terms and conditions" under which the United States is willing to permit the exercise of such privileges *(Alabama Power Co. v. Federal Power Comm.*, 128 F. (2d) 280, 287). This is both logical and just under the very special circumstances involved in the development of hydro-electric "projects" on the "public lands," "reservations" and "navigable waters" (Section 3 (1), (2), (8)), over all of which the United States exercises the prerogative of proprietorship as well as that of sovereignty *(Light v. United States*, 220 U. S. 523, 31 Sup. Ct. 485).

PART II. "REGULATIONS OF INTERSTATE ELECTRIC COMPANIES ENGAGED IN INTERSTATE COMMERCE."

Commission Draft of Bill:

"Ascertainment of Cost of Property.

"Sec. 211. (a) The Commission shall have power to ascertain for the purposes of this title and title III the actual legitimate prudent cost of the property of every public utility, and every fact which in its judgment may or does have any bearing on the determination of such cost.

"(b) The Commission may require any public utility to file with it an inventory of all or any part of the property of the utility and of the original cost thereof, including only those elements of cost that may be considered for purposes of determining just and reasonable rates under the provisions of this title and title III and the rules and regulations of the Commission. The Commission shall keep itself informed regarding the cost of all additions, betterments, extensions, and new construction of the property of every public utility.

"(c) In determining just and reasonable rates, the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.

(Page 35).

Note: As shown by Appendix D, *post* the foregoing proposal was rejected by Congress in Section 208 of the Federal Power Act (original number 211). Section 208 as enacted was reenacted as Section 6 of the Natural Gas Act.

Excerpts From Testimony of Commissioner Seavey of the Federal Power Commission.

"Section 202 (p. 104) imposes *in general terms* the duties of a public utility upon every operating company embraced within the jurisdiction defined in the preceding section. They are required to furnish exchange, and transmit energy upon reasonable request, to maintain adequate service, and to charge reasonable and nondiscriminatory rates."

(Page 385)

"Section 211 authorizes the Commission to ascertain the actual prudent cost of the property of every public utility under its jurisdiction and to require the utilities to file inventories of their property and its cost. It directs the Commission to keep itself informed of the cost of all additions and betterments to utility property. And it provides that in determining just and reasonable rates, the Commission shall fix rates which will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question. Rate regulation must eventually be based on prudent investment. Recent decisions of the Supreme Court and the respect which the Court has always paid to the constitutional interpretations of the coordinate branches of the Government afford grounds for hope that this highly desirable result will be accomplished if the Congress should now definitely adopt the prudent cost rate base. This would present the case to the Court in a new light with a declaration of national policy that it has never had before."

(Page 386)

"Section 310 gives to any person aggrieved by an order of the Commission the right to have such order reviewed in the Circuit Court of Appeals of the United States for any circuit wherein such person resides or has his principal place of business or in the Court of Appeals of the District of Columbia. The review is upon the record made before the Commission."

(Page 387)

"The broad general purposes of the bill may be defined briefly, as, first, the strengthening in times of peace of the national defense, and secondly, the conservation and planned use of the Nation's resources, and thirdly, the development of the social and economic stability of the Nation."

(Page 391)

"I want to remove any doubt that this Federal Commission would have jurisdiction over the fixation of intrastate rates, because I think it is not necessary."

(Page 397)

"As I have indicated, it is the purpose of this bill that

the Federal Power Commission will assume only jurisdiction over the interstate wholesale business of these companies. I think I have already made that plain."

(Page 402)

"Mr. Bulwinkle: I say, in California, using it because you are familiar with it, how far have you fallen down on your regulation of the utilities because of the failure to have regulation?

"Commissioner Seavey: Well, I was going to give you some instances, if you would let me continue.

"Mr. Bulwinkle. Proceed.

"Commissioner Seavey. For instance, the California Commission has not been able to completely regulate because of the interstate contracts for management service and engineering and other classes of service.

"Now I state that, and perhaps should be specific—

"Mr. Bulwinkle: You mean that on account of the holding company that made these service charges against the operating companies; is that what you mean?

"Commissioner Seavey. Yes; whether it is a holding company, or any other.

"Mr. Bulwinkle: Over the heads of the operating companies, either one.

"Commissioner Seavey: Yes; or a service company that may enter into contracts without being a holding company or an overhead control.

"Mr. Bulwinkle: Now that is one illustration. Could that not be taken care of under any circumstance by the State utilities commission?

"Commissioner Seavey: No, not properly; not completely.

"The reason for that is this: I will give you an instance: In 1924 I held a hearing on the Southern California Telephone Co. That company, according to the best information we could get from its books and records, was being depleted because of the withdrawal of funds

by the A. T. & T. through an affiliate in the form of fees and charges. That was not the entire reason for the inability of that company properly to function, but that and other reasons brought that utility before the commission and I might say that condition was started probably before the commission had jurisdiction. What brought that utility before the California Commission was a request for an increase of rates. And one of the elements that caused the increase of that rate was the draft upon the utility by the outside control.

"Now, in handling that rate case, it is true that the California commission at that time cut down that fee something like a half or more, but that did not stop the drafts upon the utility by an outside party. They could legally collect it, but it would not be allowed in California in the rate base, in the expenses in fixing the rates.

"Mr. Bulwinkle: That is an illustration, Mr. Commissioner, of the telephone company.

"Commissioner Seavey: Yes.

"Mr. Bulwinkle: Have you an illustration affecting a power company?

"Commissioner Seavey. Yes; I have one of a power and gas company. The San Diego Gas & Electric Co. is a subsidiary of the Byllesby people. They have been charging something like $170,000 yearly for their services. The California commission found that $70,000 was a reasonable cost of those services, and only allowed that much in fixing rates; but the Byllesby Co. can still draw upon that company and deplete its reserves, without the California company being able to take it in a rate case."

(Pages 406-407)

"Commissioner Seavey. Yes; the jurisdiction only goes to interstate and if there is any doubt about that, language should be put in there; but it is believed that covers it."

(Page 410)

"Mr. Huddleston: Mr. Seavey may I direct your attention to the rule of rate making on *page 117, subsection (c)* (*Note: Sec. 211*)

"Commissioner Seavey. Yes.

"Mr. Huddleston: Where did that come from?

"Commissioner Seavey: Where did that come from?

"Mr. Huddleston: Where did you take that from?

"Commissioner Seavey: That approximately comes not wholly from, and is the bases upon which the rates are fixed in California. There is added to these requirements which are not in the California statute, but which exist by administration, in the belief that they should be allowed a return upon a value controlled by the prudent cost of the property."

(Page 411)

Excerpts from Testimony of Solicitor DeVane of the Federal Power Commission

"Mr. DeVane: There has been considerable discussion here as to what is the purpose of this legislation and the effect it will have upon States and upon State regulation, and in that connection, I wish to say that in the instruction to its representatives that participated in the preparation of this legislation, the Federal Power Commission directed that what it desired to recommend to Congress was legislation that would complement and not supersede State regulation.

"Our specific instructions, from our Commission, was to preserve to the fullest extend State regulation and to draw a law that would complement that regulation as far as Congress could go.

"Now, that has been done and I desire to state in the beginning that this law was prepared as a complement to State legislation and with the few exceptions that I shall point out does not in any particular supervise or destroy State regulation."

(Page 495)

"I will make reference to these sections as I talk about section 201.

"I would like to say first that insofar as rates are concerned that section 201 is intended to give the Fed-

eral Power Commission jurisdiction over the wholesale rates only; rates over which the State commissions have no jurisdiction as decided by the Supreme Court of the United States in the *Public Service Commission v. The Attleboro Steam & Electric Co.*, 273 U. S. 83.

"Now, that is so far as rates are concerned.

"It does not extend the jurisdiction, and it is not intended to extend the jurisdiction to cases such as the *Pennsylvania Gas* case decided by the Supreme Court, where the energy was transmitted in interstate commerce over the State line and sold by the same company for local distribution. It is our opinion that under the decision of the Supreme Court in that case, the jurisdiction of this Commission might be extended to that kind of a case; but this bill does not go that far. The bill only applies to interstate rates at wholesale in interstate commerce."

(Pages 497-498)

"Insofar as the facilities are concerned, it takes no jurisdiction away from the States, but it does confer additional jurisdiction upon this Commission as to those facilities that have to do with interstate transmission.

"I want to make that distinction very clear, because it has nothing to do with facilities that relate only to local distribution or to transmission lines used for local distribution."

(Page 501)

"Mr. Cooper. May I ask this question? I am merely asking it for information. Suppose that 95 percent of the business of one of these utilities is confined within the State and 5 percent was interstate commerce, would your Commission have any authority or jurisdiction over the public utility?

"Mr. DeVane. No; not entire jurisdiction over the public utility. The Power Commission would have jurisdiction over that 5 percent of interstate energy, if it were transmitted and sold in interstate commerce at wholesale.

"Mr. Cooper. Just at wholesale?

"Mr. DeVane. Just at wholesale. The Power Commission would have jurisdiction over the transmission lines that transport that energy from the point of production in interstate commerce. The Power Commission would have jurisdiction over the production facilities insofar as that was necessary for the regulation of the energy that moved in interstate commerce."

(Page 502)

"Mr. DeVane. Yes sir; that is one of the sections that I referred to in connection with section 201.

"You will find that subsection (a) of section 211 provides that the Commission shall have power to ascertain for the purpose of this bill, actual legitimate prudent cost of the property of every public utility and every fact which, in its judgment, may or does have any bearing on the determination of such cost.

"Now, that fits right into the picture of the separation of this property between State and interstate use.

"In this separation, we know of no way of dividing it other than that specified by the Supreme Court of the United States in the Minnesota rate case: Where you can ascertain the cost of the property, you can readily determine what percentage of the property is used in interstate commerce and what percentage is used in intrastate commerce, and you can divide for the benefit of the Federal Commission and the State commissions that part of the property that is used in interstate commerce, which will determine rates, and that part that is used in intrastate service, upon which intrastate rates will rest."

(Page 505)

"Mr. DeVane. No, sir; and I want to make that very definite: and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear. We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate."

(Page 514)

"At the outset of my discussion of title II of title II, I pointed out the provisions in connection with the jurisdiction conferred by this title, called attention to the fact that insofar as rates were concerned, the title conferred jurisdiction upon the Federal Power Commission over wholesale rates that were not subject to control by State Commissions under the decision of the Supreme Court in the Attleboro case."

(Page 518)

"In section 202 (b) is the same provision with reference to rates and charges that is found in each other act of Congress conferring jurisdiction on regulatory bodies."

(Page 531)

"• • • But, I do want to say in connection with any of the statements that I have made with reference to any language used in title II of title II, that what I have said to this committee as to the purpose of this legislation, and as to the desire of the Federal Power Commission, presents the purpose and the desire of the Commission and that there is no desire whatever to obtain results through this legislation that I have not stated.

"We are not using words that are ambiguous with the intention or in the hope of getting a different result when the legislation is passed. We are perfectly sincere in our efforts to accomplish a certain purpose, and we have used language that we think accomplishes that purpose."

(Page 551)

"Mr. DeVane. Yes; in connection with that, may I refer to section 211 (c), on page 117: section 211 (c).

"I think probably I should refer to section 211 in its entirety, but particularly I want to address a few remarks to 211 (c).

"Section 211 authorizes the Commission to ascertain the actual prudent cost of the property of every public utility under its jurisdiction and to require the utilities to file inventories of their property and its cost. It directs the Commission to keep itself informed of the cost of all additions and betterments to utility property. And it

provides that in determining just and reasonable rates, the Commission shall fix rates which will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question. Rate regulation must eventually be based on prudent investment. Recent decisions of the Supreme Court and the respect which the Court has always paid to the constitutional interpretations of the coordinate branches of the government afford grounds for hope that this highly desirable result will be accomplished if the Congress should now definitely adopt the prudent cost rate base. This would present the case to the Court in a new light with a declaration of national policy that it has never had before.

"Now, I direct your attention to the provisions of section 202 which is merely declaratory of the common-law principle that rates shall be just and reasonable. I directed your attention to 211 (a) this morning as being complementary to State regulation. Section 211 (a) will secure a body of information, which I think is most valuable in the administration of this act and as an aid to the State commissions in their regulation of consumers.

(Page 572)

APPENDIX D.

COMPOSITE OF SECTION 208 (ORIGINALLY NUMBERED 211) OF THE FEDERAL POWER ACT AS PROPOSED BY THE POWER COMMISSION AND AS ENACTED BY CONGRESS.

The *italicized* language, together with the language of the text, *not stricken*, constitutes the section of the Act in question, *as enacted by Congress.*

The *italicized* language, together with the language of the text *as stricken*, constitutes the section as drafted by the Federal Power Commission, submitted by it to Congress, with extensive supporting discussion, *but rejected by Congress.*

(a) *The Commission* ~~shall have power to ascertain for the purposes of this title and title III~~ may investigate and ascertain *the actual legitimate* ~~prudent~~ *cost of the property of every public utility*, the depreciation therein, and when found necessary for rate-making purposes, ~~and every fact which in its judgment may or does have any bearing~~ other facts which bear *on the determination of such cost* or depreciation, and the fair value of such property.

(b) ~~The Commission may require any~~ every *public utility* upon request shall ~~to~~ *file* ~~with it~~ with the Commission *an inventory of all or any part of* ~~the~~ its *property* ~~of the utility~~ and a statement of the original cost thereof, ~~including only those elements of cost that may be considered for purposes of determining just and reasonable rates under the provisions of this title and title III and the rules and regulations of the Commission. The Commission~~ and *shall keep* ~~itself~~ the Commission *informed regarding the cost of all additions, betterments, extensions, and new construction* ~~of the property of every public utility.~~

~~(c) In determining just and reasonable rates, the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.~~

Note. This section, as enacted by Congress, is also Section 6 of The Natural Gas Act, with the substitution of the descriptive words "natural gas company" for the words "public utility."

APPENDIX E.

COMMENT UPON AND ANALYSIS OF VARIANT POSITIONS AND CONTENTIONS OF FEDERAL POWER COMMISSION WITH RESPECT TO THE PRINCIPLE OF "FAIR VALUE" AS THE RATE BASE OF ELECTRIC AND GAS UTILITIES.

During the eight-year period from the effective date of the Federal Power Act (August 26, 1935) and the effective date of the Natural Gas Act (June 21, 1938) to 1943, the Federal Power Commission has taken various and divergent positions in its decisions, reports, briefs and other public announcements, as to the proper and lawful rate base of those utilities over which it has rate-regulatory control under the Federal Power Act and the Natural Gas Act. The eight-year period, under the circumstances, divides itself into three shorter intervals, to-wit: (A) Years 1935-1940, (B) Year 1940, and (C) Years 1941-1943.

(A) YEARS 1935-1940.

During this period the Power Commission accepted the principle of "fair value" as controlling, and made no contention that Congress, either in the Federal Power Act or in the Natural Gas Act, abrogated the principle of "fair value" or established, or authorized the Commission to establish, the so-called "actual legitimate prudent cost" rate base. This is evident from the following:

(1) The Commission, reporting for the year 1935, declares:

> "The Public Utility Act of 1935 deals with a twofold problem. In title I of the new statute the Congress has asserted its jurisdiction over the financial structure and practices of holding-company systems with a view to the elimination of the economic burdens which holding-company control had placed upon local operating utilities. In title II the Congress has established regulatory control over the interstate activities of electric utilities which were beyond the constitutional or effective administrative control of the States, and has set up machinery for Federal assistance to State regulatory bodies in their efforts to accomplish effective public regulation.

"New Powers Conferred Upon the Commission"

"The authority to fix rates over that part of interstate energy which is sold wholesale for resale is one of the powers conferred by title II upon the Commission. This power was held to be beyond the authority of the States by the United States Supreme Court in *Public Utilities Commission v. Attleboro Company*, 273 U. S. 83. The object of this provision is to insure reasonable wholesale rates and to prevent interstate companies from discriminating in favor of consumers of one State at the expense of consumers of another State. The act does not give the Federal Commission any authority over local rates for electric service, this function being reserved exclusively to the States."

Annual Report, 1935, Federal Power Commission, pp. 1-2.

(2) The Commission, reporting for the year 1937, states:

"Prudent Investment Rule in Rate-Making Urged Upon the Supreme Court"

"During the past generation the growth of public utility operations has raised complex administrative problems not the least of which has been the evolution of an adequate workable rule for fixing some base upon which to predicate fair rates of return that would insure financial stability to operating companies and provide consumers with efficient service at reasonable rates. The fact that no adequate and workable rule has been evolved has been due in large part to an interpretation placed by the Supreme Court upon the fair value of utility property for rate-making purposes, in a line of decisions starting with the case of *Smyth v. Ames*, decided in 1898.

"As this issue, important alike to this Commission and to State regulatory agencies throughout the country, was involved in the case of *Railroad Commission of the State of California v. Pacific Gas and Electric Company*, pending before the United States Supreme Court, the Federal Power Commission, by leave of the Court, was permitted to file a brief *amicus curiae*, and its general counsel to appear in oral argument when the case was heard on November 11, 1937.

"This Commission entered the case for the purpose of defending the constitutionality of the prudent investment principle and to urge that the Court reverse the doctrine of *Smyth v. Ames*, adopted 39 years ago, *which requires consideration of reproduction cost as an element in determining the fair present value of utility property for rate-making purposes.*

* * * * *

"Under the Federal Water Power Act of 1920 public utility companies securing license *were required to consent* to the use of net investment (the statutory equivalent for prudent investment) in the licensed project as a rate base in those situations in which the Commission could prescribe rates. The amendment of 1935 placing under the jurisdiction of the Commission interstate electric utilities did not expressly prescribe prudent investment as the base for rate-making purposes, but if the Supreme Court should approve as constitutional the theory of rate making for which the Commission is contending, the language of the amendment of 1935 would be sufficiently broad to enable the Commission to apply the prudent investment rule in fixing those rates which it is authorized to regulate.

"The Commission pointed out that since the Commission is standing on the threshold of a new era of Federal regulation involving an industry which for the first time has been subjected to the regulatory power of the Congress and is faced with the important function of rate making, it is deeply concerned in the establishment of a legal principle which will be consistent with and not obstructive to a sound administration of the rate-making power.

"The position taken by the Commission is that *if it is to be required under the Constitution, in fixing electrical rates to consider reproduction cost as an essential element in the determination of a rate base* its administrative task will be well-nigh impossible of performance. It expressed the belief that a sound basis—sound in administration, in economics, and in law—upon which the public utility properties should be valued for rate-making purposes is the prudent investment in those properties, and

that such a basis is entirely consistent with the requirements of the 5th and 14th Amendments of the Constitution.

"It was urged upon the Supreme Court that the rule of *Smyth v. Ames*, however much it may have been justified when applied to the facts of another generation, has no justification in economics or in law when applied to the realities of the present day." (Emphasis ours.)

Annual Report, 1937, Federal Power Commission, pp. 10-11

(3) The Commission, reporting for the year 1938, says:

"The decision of the Supreme Court in the case of *Railroad Commission of the State of California v. The Pacific Gas and Electric Co.*, in which the Commission filed a brief *amicus curiae*, and its general counsel participated in oral argument, adopted the view which the Commission had urged upon the Court that the Railroad Commission of California, in refusing to give any probative weight to evidence of reproduction cost in determining the proper rate base, had not deprived the Pacific Gas and Electric Co. of due process of law. The Supreme Court remanded the case to the District Court with instructions to make findings as to whether the rate fixed by the State Commission resulted in confiscation of the company's property. It is extremely significant that, upon remand the District Court held that the rate base fixed by the Railroad Commission of California, without giving effect to evidence of reproduction cost of the company's properties, was a proper basis upon which to permit the company a reasonable rate of return."

Annual Report, 1938, Federal Power Commission, pp. 30-31.

(4) The Commission in its decision in case of *City of Los Angeles v. Nevada-California Electric Corp.*, Jan. 25, 1940, 32 P.U.R. (n.s.) 193, in determining a rate base and fixing the rates of the corporation therein involved, *did not declare, and so obviously had not then discovered, as now claimed,* that five years earlier in 1935 Congress had discarded the principle of "fair value" as the utility rate base under

Section 208 of the Federal Power Act. The Commission, at page 203 of 32 P.U.R. (n.s.) declares:

"However, we believe the original cost of construction of the Boulder canyon line is the best evidence of the amount to be used as a rate base in this proceeding."

The Commission cites in support of this conclusion: *Clark's Ferry Bridge Co. v. Pennsylvania Public Service Commission* (1934), 291 U. S. 227, 54 S. Ct. 427, wherein this Court held, in recognition of the governing principle of "fair value," that under the facts in that case the "reasonable cost of the structure furnished a proper basis for determining its *fair value*." (Emphasis ours.)

Comment: Thus, as late as the early portion of the year 1940, the Power Commission had not undertaken to outlaw "fair value" either in its annual reports or in its decisions.

(B) YEAR 1940:

The Commission, reporting for the year 1940, proclaims:

"Space does not permit an extended discussion of all the details inherent in the regulatory problem. *Suffice it to say that the complications resulting from the 'fair value' theory, with its reproduction costs, its going value, its observed depreciation, etc., pose but a part of the problem which constantly confronts those charged with the responsibility for making regulation reasonably effective in the public interest.*

"The machinery for handling the regulatory problem cannot safely be confined to old methods. The regulatory agency is in fact a 'tribunal of the people' designed to 'furnish protection to rights and obstacles to wrongdoing which, under our new social and industrial conditions, cannot be practically accomplished by the old * * * procedures' used in dealing with adversary suits in the law courts.

* * * * *

"The following important developments in rate making policy are reflected in the Commission's formal decisions issued during the last year:

"1. *The insistence by the Commission on a prudent investment rate base.*" (Emphasis ours.)
Annual Report, 1940, Federal Power Commission, pp. 13, 62.

Comment: It is to be observed that in 1940 the Commission, in seeking to revolutionize the law of rate base, *was undertaking to do so on its own power.* It is significant that *at that time* no contention was made that the governing principle of "fair value" had been cast aside and abrogated in the Federal Power Act (1935) or the Natural Gas Act (1938).

(C) YEARS 1941-1943.

(1) Thereafter, beginning with the case of "*In the Matter of Chicago District Electric Generating Corporation,*" *supra,* (July 16, 1941), the decisions of the Commission departed radically from its own previous announcements, as well as the law of the land. The Commission, *In the Matter of Cities Service Gas Company* (July, 1943) (50 P. U. R. (n. s.) 65) expressly excludes and discards all evidence of "fair value," under the asserted authorization of Section 6(a) of the Natural Gas Act, and declares, by its reference to *The Matter of Chicago District Electric Generating Corporation, supra,* that such also was the intent and effect of its earlier ruling in that case, *and that Congress so intended and enacted in 1935.*

(2) However, and strangely, in 1942, in the two extensive briefs filed by the Commission in this Court, in *Federal Power Commission v. Natural Gas Pipeline Company,* 315 U. S. 575, wherein the Commission renews extensively its attacks upon "the doctrine of *Smyth v. Ames*" (See *Railroad Comm. v. Pacific Gas & Electric Co.* (1938), 302 U. S. 388; *Driscoll v. Edison Light & Power Co.* (1938), 307 U. S. 104), no slightest suggestion was made that Congress, *as now contended,* had established or authorized the so-called "actual legitimate prudent cost" rate base and discarded and abrogated "fair value" as the controlling principle, in the Federal Power Act and the Natural Gas Act.

(3) Counsel for the Power Commission appearing before the Public Utility Section of the American Bar Association in August, 1942, asserted in reliance on the special con-

curring opinion of Justices Black, Douglas and Murphy in the *Natural Gas Pipeline Company* case, *supra* (March 16, 1942), that fair value had been discarded and abrogated in that case. This assertion is made despite the statement of the Justices: "As we read the opinion of the court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost, or of giving any weight *to that element of fair value.*" (Emphasis ours.) Commission Counsel declared with finality:

> "I look forward with avid anticipation to the gymnastics—intellectual or otherwise—with which some of you here who represent the industry may attempt to dispel the rigor mortis of fair value which set in on March 16, 1942."

It seems evident that Counsel was not certain of his conclusions as to the force and effect of this Court's opinion in that case. Perhaps he had read the significant language of *Chief Justice Stone*, speaking for six members of the Court, who at page 590 of 315 U. S. declared: "*The total value* of the companies' plant, including equipment in excess of immediate needs when beginning business, has been included in the rate base adopted." (Emphasis ours.) For here is the express recognition of the application of the principle of value in that case.

And so later in his address we find Counsel declaring:

> "*Consider first the pattern set by the Federal agencies.* No one can avoid the plain unvarnished fact that as far as both the Federal Power Commission and the Securities and Exchange Commission are concerned, fair value has been relegated to the limbo of outmoded doctrines." (Emphasis ours.)

Comment: Not Congress nor the Courts, but "the federal agencies," identified as the Federal Power Commission and the Securities and Exchange Commission, it seems have "relegated to the limbo of outmoded doctrines" the principle of "fair value."

Conclusion: The above summary of Power Commission position and decision, prior to the decision of this Court in the *Hope Natural Gas Company* case, as to *rate base* supplements the impressive legislative history showing that that

body deems itself either exempt from the restraints of law or possessed of a virtually unlimited "discretion." In either event the lawful source of such asserted authority is not disclosed. In fact the entire absence of such authority is affirmatively established by the unambiguous terms of *Section 6* of the Natural Gas Act and *Section 208* of the Federal Power Act. The statutory construction indulged by the Commission involves and requires both additions to, eliminations from and substitutions for the statutory words and concepts to produce the meaning urged by it. The Commission "construction," so-called, amounts to far-reaching administrative legislation, nothing less and nothing else.